

ARTICLE

Dependence and Hierarchy Among Constitutional Theories

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I. INTRODUCTION

After two hundred years of constitutional decisionmaking, there is little consensus on the methods by which constitutional cases should be decided. Various theories,¹ and combinations of theories,² have their followers. Fashions come and go,³ but the field of contenders does not permanently narrow.

Nevertheless, a measure of order can be brought to the confusion of the competing normative theories of constitutional decisionmaking. Although no particular normative theory is invariably better than the others, there are some crucial logical and practical dependencies of the theories upon rival theories. It is not merely that the theories overlap, come in various

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¹ See the several broad families of constitutional decision making theories discussed *infra* Part II.A–F.

² Some of the broad families of theories have obvious affinities. Perhaps the most obvious candidates for a combined theory would be a form of constitutional textualism requiring some attention to the original intent underlying the Constitution. See *infra* Part II.C–D.

³ Theories that have lost favor temporarily may regenerate themselves in more sophisticated versions. See, e.g., references to the “new textualism” *infra* notes 185, 201.

forms and versions, and are hard to separate and distinguish.⁴ Rather, most of the contending theories, whatever their other flaws, are crucially dependent on general moral principles, and more precisely, upon one or more of their rival theories of constitutional adjudication.⁵

Not all of the theories, however, are equal in their degree of dependency on their rivals. We will offer a general ranking of the theories in order of such dependency,⁶ understanding that this rank is not necessarily reflective of the overall value or insightfulness of the theories. A theory that is starkly dependent on a rival theory, or is otherwise incomplete, might offer uniquely valuable insights.⁷ Nonetheless, we would certainly want to consider a theory's degree of dependence on its rivals in assessing its overall value.

Thus, this article views the normative theories of constitutional decisionmaking as arrayed in a hierarchy of dependence upon rival theories. It will expose the crucial dependencies of the various theories not to dismiss any, but, as the Hegelians say,⁸ to transcend those individual theories while sustaining and preserving their distinctive value in deciding constitutional cases. The goal is to accommodate the value of

⁴ According to some, textualism and original author intent are inseparable. See, e.g., E.D. Hirsch's theory referred to *infra* notes 153, 159.

⁵ The arrangement of theories below is intended to reflect a general hierarchy of dependency, with admitted complications, and even some reciprocal dependencies among the theories. By the idea of any Theory A being "dependent" upon some rival Theory B, we do not mean merely that Theory B plays some important role in the operation or attractiveness of Theory A. We mean as well that Theory A relies upon Theory B in a particularly important way. Crucially, the idea is that because of the nature of the dependence, Theory A's main critique of Theory B must unavoidably come back to haunt – or apply to – Theory A with equal seriousness.

⁶ For well-known typologies with similar elements, see, e.g., Richard H. Fallon, Jr., *A Constructivist Coherentist Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194 (1987), discussed *infra* notes 155–57. See also PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1982). Professor Bobbitt discusses historical (or original intent) arguments, textual arguments, structural arguments (which we take to include textual as well as pragmatic arguments), prudential arguments (a portion of our broadly pragmatic arguments), and doctrinal arguments (including our precedential arguments, but also including academic or judicial commentary we would classify based on their content). See *id.* at 7. Bobbitt also discusses what he calls ethical or political ethos-based, as opposed to moral, arguments. See *id.* at 94–95. We distinguish constitutional contract-based arguments, *infra* Part II.E, and natural law and natural rights-based arguments, *infra* Part II.F.

⁷ For example, the dependencies of textualism on rival approaches hardly licenses our ignoring the text of the Constitution.

⁸ The classical term would be *aufgehoben*. For discussion, see, e.g., W.T. STACE, *THE PHILOSOPHY OF HEGEL* 106 (Dover Publications 1955) (1923).

each of the rival constitutional theories, without sinking into a mere eclecticism.

We must not oversimplify matters, however. There is a difference between crucial foundational dependence and mere supplementation or enhancement by rival theories.⁹ The dependencies among the theories are multiple and to some degree mutual or reciprocal,¹⁰ even among those ranked apart from each other in the general dependence hierarchy.¹¹ And since each of the theories is actually a family of theories, with broader and narrower versions,¹² the complications of ranking constitutional theories in terms of dependence could be multiplied indefinitely. But not all possible dependency rankings are equally plausible, nor do they tell an equally valuable overall story.

Any progress along these lines will first require identifying the most important families of normative approaches to constitutional decisionmaking.¹³ There are six more or less distinguishable approaches,¹⁴ setting aside the inevitable overlaps and the varied possibilities for combination and subdivision.¹⁵ Part II of this article will discuss these six general constitutional approaches: (1) Contemporary Constitutional Pragmatism;¹⁶ (2) Case Precedent-Based Theories;¹⁷ (3) Textualist Theories;¹⁸ (4) Originalist or Original Intent-Oriented Theories;¹⁹ (5) Constitutional Contractarian or

⁹ See *infra* Part II.D (following how originalist theories may be supplemented by precedent-based theories, but are foundationally dependent upon constitutional-contractarian and ultimately upon natural law or natural rights-based theories).

¹⁰ For example, it is difficult to develop an original intent theory or a constitutional contractarian theory in which both do not significantly rely upon one another. See *infra* Part II.D–E.

¹¹ For example, if we are seeking the original intent of drafters and ratifiers, we may well be tempted at one point or another to draw upon pragmatist assumptions.

¹² For example, in seeking the meaning of a text, or in seeking original intent, we could narrowly confine ourselves to the passage itself, the entire document, or to a narrower or broader range of external sources, such as the *Federalist Papers*.

¹³ Our inclusions and exclusions differ in only limited ways from those of other writers. See also the listing in GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 40–43 (4th ed. 2001) (listing original intent, textualism, precedent, prevailing social consensus, and principles of justice). See also *infra* notes 156–57 (Fallon typology) and *supra* note 6 (Bobbitt typology).

¹⁴ See *infra* Parts II.A–F.

¹⁵ See, e.g., *supra* note 2.

¹⁶ See *infra* Part II.A.

¹⁷ See *infra* Part II.B.

¹⁸ See *infra* Part II.C.

¹⁹ See *infra* Part II.D.

Contract Theories;²⁰ and (6) Particularized Natural Law and Natural Rights-Oriented Theories.²¹ These approaches are addressed in order of generally greatest dependence to least dependence, logically or in practice, upon one or more rival such approaches. Part II will argue that not all constitutional theories are equally dependent upon one another, and that some rough, imperfect hierarchy of dependence among the theories can be developed. It concludes that a very inclusive, broadly defined family of natural law and natural rights theories is the least dependent upon its rivals. Given the breadth and inclusiveness of the natural law and natural rights family of theories, along with their relative independence, this Part suggests that we should think of constitutional decisionmaking as inescapably a complex morally-governed act.²²

Part III. A therefore addresses certain basic questions about moral decisionmaking. Moral talk in general often involves discussions not only of rights and of right and wrong, but also of good and bad and even of virtue and vice.²³ It will thus explore whether the Constitution, or our constitutional culture, steer us toward talking in one set of terms rather than another. Finally, Part III. B addresses whether there is any real, practical difference between aspiring to reach objectively morally better constitutional decisions and abandoning any aspiration to moral objectivity in constitutional decisionmaking. Although constitutional decisionmaking is inevitably haunted by much indeterminacy, we will argue that the aspiration to moral objectivity nevertheless can make a practical difference, and indeed a difference for the better.²⁴

II. THE CANDIDATE THEORIES AND THEIR HIERARCHY OF DEPENDENCE

A. *Contemporary Constitutional Pragmatism*

This section will focus on pragmatism in a constitutional context. It will conclude that whatever merits or

²⁰ See *infra* Part II.E.

²¹ See *infra* Part II.F.

²² See generally *infra* Part III.

²³ See generally *infra* Part III.

²⁴ See generally *infra* Part III.B.

defects constitutional pragmatism may otherwise have,²⁵ it must rank as the single approach most crucially and pervasively dependent upon rival theories.²⁶ Indeed, constitutional pragmatism is not so much merely dependent as omni-dependent on its various rivals.

Of late, pragmatism's influence on the law in one form or another²⁷ has been substantial.²⁸ American philosophical pragmatism has been developed and transformed by writers such as Charles Sanders Peirce,²⁹ William James,³⁰ John Dewey,³¹ and, most notably in the contemporary academy, Richard Rorty.³² In the legal field, the proponents of one form or another of constitutional pragmatism include academics such as Daniel Farber³³ and the well-known Seventh Circuit judge Richard A. Posner.³⁴ Both Professor Farber and Judge Posner have explicitly addressed matters of constitutional methodology and theory.

²⁵ For broader discussion, see R. George Wright, *Pragmatism and Freedom of Speech*, 80 N.D. L. REV. 103, 123 (2004).

²⁶ See the rationale developed *infra* Part II.A.

²⁷ Thus while William James, Richard Rorty, Daniel Farber, and Richard Posner can all be called pragmatists, their respective pragmatisms vary significantly. See *infra* notes 30, 32–34.

²⁸ See, e.g., the work of Professor Farber and of Judge Posner, *infra* notes 35–36. See also Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996).

²⁹ See, e.g., CHARLES S. PEIRCE, *How to Make Our Ideas Clear*, in PHILOSOPHICAL WRITINGS OF PEIRCE 23 (Justus Buchler ed., Dover Publications 1955) (1878).

³⁰ See, e.g., WILLIAM JAMES, PRAGMATISM (Prometheus Books 1991) (1907).

³¹ See, e.g., JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (Beacon Press ed. 1948) (1920).

³² See, e.g., RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989); 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS (1991); 3 RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS (1998).

³³ See, e.g., Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988) [hereinafter Farber, *Legal Pragmatism*]; Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163 (1995). [hereinafter Farber, *Reinventing Brandeis*].

³⁴ See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) [hereinafter POSNER, LAW, PRAGMATISM, AND DEMOCRACY]. Justice Stephen Breyer seems to endorse a broad form of value-based pragmatism when he emphasizes consequences, in constitutional value terms, in judicial decisionmaking. See Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247–50 (2002).

Professor Farber, by himself³⁵ and in collaboration with Philip Frickey³⁶ and Suzanna Sherry,³⁷ endorses pragmatism in partial contrast to “high level” or “grand” constitutional theory.³⁸ Farber’s constitutional pragmatism seeks to be eclectic³⁹ without being so in a merely “ad hoc”⁴⁰ or totalistic fashion.⁴¹ He rejects what he refers to as “foundationalism”⁴² in constitutional theory⁴³ or “confining reason to logical deduction from set premises.”⁴⁴ Professor Farber’s attempts to avoid a sort of Cartesianism⁴⁵ in constitutional theory, in which a foundationalist seeks to construct an elaborate and broadly applicable theory in hierarchical fashion, based upon one or a few intuitively certain foundational principles. He is suspicious of such a rigorous, deductivist reliance on unassailable basic premises.⁴⁶

³⁵ See, e.g., Farber, *Legal Pragmatism*, *supra* note 33; Farber, *Reinventing Brandeis*, *supra* note 33; Daniel A. Farber, Book Review, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675 (1999) (reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)).

³⁶ See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987).

³⁷ See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002). This work is reviewed by Steven D. Smith, *Desperately Seeking Serenity*, 19 CONST. COMMENT. 523 (2002).

³⁸ See Farber & Frickey, *supra* note 36, at 1615–16. See also Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 922 (2001); FARBER & SHERRY, *supra* note 37, at 140–68.

³⁹ See Farber & Frickey, *supra* note 36, at 1616.

⁴⁰ *Id.* at 1617.

⁴¹ See *id.* at 1627–28.

⁴² See *id.* at 1616–17.

⁴³ Pragmatists generally, and Professor Farber in particular, use foundationalism in more than one sense. See, e.g., RORTY AND HIS CRITICS (Robert B. Brandom ed., 2000) (discussing the several perspectives of pragmatism). See also Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 610 (1999) (discussing legal pragmatism as anti-theoretical in the sense of denying “that practices must be grounded in any foundation”). Farber associates constitutional foundationalism variously with unitary versus pluralist theory, deductivism, intuitively grounded theory, and with theory designed not to change or adapt. See Farber, *Legal Pragmatism*, *supra* note 33, at 1334–37, 1342. Each of these elements could be present without the other. Each could pull in different directions. And we could imagine a theory that combines intuition and deduction with other modes of reasoning in an overall coherence-focused web-like structure – which would probably not be far from “common sense.”

⁴⁴ See Farber & Frickey, *supra* note 36, at 1617.

⁴⁵ See *supra* text accompanying note 43.

⁴⁶ See Farber & Frickey, *supra* note 36, at 1616.

Professor Farber's pragmatic approach thus seeks to avail itself of "practical reason"⁴⁷ and "the full range of cognitive abilities"⁴⁸ beyond merely narrow, rigid deductivism. Professor Farber prefers "thinking small,"⁴⁹ inclusively, and flexibly. Closely associated with Professor Farber's pragmatism are "intuitionism"⁵⁰ – presumably not the kind of intuitionism that is often associated with foundationalism⁵¹ – as well as "prudence,"⁵² "situation-sense,"⁵³ and "contextual justification."⁵⁴

For example, Professor Farber focuses on Justice Brennan's multi-dimensional, overlapping consensus-oriented⁵⁵ opinion in the landmark libel case of *New York Times v. Sullivan*.⁵⁶ Justice Brennan's opinion in *Sullivan* is said to exemplify decisionmaking "not by deductive logic, but by a less-structured, problem-solving process involving common sense, respect for precedent, and a sense for society's needs."⁵⁷ For Professor Farber, "it is [Justice] Brennan's 'situation-sense,' his authentic attachment to first amendment values, and his immersion in the first amendment tradition that deserve emulation."⁵⁸

In parallel fashion, Professor Farber has defended constitutional pragmatism against the claims that it "disregards precedent"⁵⁹ or "denigrates legal rights"⁶⁰ by asserting that it wishes merely to emphasize "context, judgment, and community."⁶¹ Put summarily, "[t]he heart of pragmatist thought is the view that the ultimate test is always

⁴⁷ *Id.*

⁴⁸ *Id.* at 1617.

⁴⁹ *Id.* at 1627.

⁵⁰ *Id.* at 1645.

⁵¹ See Farber & Frickey, *supra* note 36, at 1616, 1639.

⁵² *Id.* at 1646. See also FARBER & SHERRY, *supra* note 37, at 925 (citing the work of Dean Anthony Kronman).

⁵³ Farber & Frickey, *supra* note 36, at 1635, 1637.

⁵⁴ *Id.* at 1647.

⁵⁵ See *id.* at 1635–38 in the context of John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

⁵⁶ 376 U.S. 254 (1964) (avoiding the arguably more unitary or absolutist approaches of Justices Black, Douglas, and even Goldberg).

⁵⁷ Farber & Frickey, *supra* note 36, at 1636 (footnotes omitted).

⁵⁸ *Id.* at 1637.

⁵⁹ Farber, *Legal Pragmatism*, *supra* note 33, at 1332.

⁶⁰ *Id.*

⁶¹ *Id.* at 1335. See also Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 593 (1999) ("endorsing constitutional pragmatism-as-contextualism") (a decision in context as preceding, not following, a choice of theory).

experience.”⁶² Farber’s view is that “[l]egal pragmatism – which essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy – renounces the entire project of providing a theoretical foundation for constitutional law.”⁶³ In sum, Professor Farber writes that:

Pragmatism provides no reason to exclude consideration of original intent, precedent, philosophy, social science, or anything else that might be appropriate and helpful in resolving a hard case. Ideally, all of these factors point to the same outcome. When they conflict, the only possible recourse is to make the best decision possible under the circumstances.⁶⁴

This suggests how Professor Farber’s pragmatic approach to constitutional adjudication relates to alternative approaches. Does his constitutional pragmatism somehow bypass or float freely above the other contending constitutional theories introduced above?⁶⁵ In emphasizing experience and common sense, has Professor Farber set his approach independent of the rival constitutional theories? Or is the relationship of pragmatism to the rival theories really one not of independence, but of omni-dependence?

Professor Farber’s own descriptions support the latter view. He seeks to add to the appeal of constitutional pragmatism by relying on, among other considerations, precedent,⁶⁶ the relevant legal texts,⁶⁷ original intent,⁶⁸ philosophy,⁶⁹ legal rights,⁷⁰ and first amendment values,⁷¹ presumably including democracy, autonomy, self-realization,

⁶² Farber & Frickey, *supra* note 36, at 1341. Farber is of course echoing Holmes’ dictum that “the life of the law has not been logic: it has been experience.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown and Co. 1949) (1881). Actually ‘experience’ either presupposes or requires some distinct theory before we know how best to characterize or evaluate our experience.

⁶³ Farber, *Legal Pragmatism*, *supra* note 33, at 1332.

⁶⁴ Farber, *Reinventing Brandeis*, *supra* note 33, at 169.

⁶⁵ See *supra* Part I. Note, however, that pragmatism builds a sense of the value of precedent – the basis of a rival theory – into itself as one component, see *supra* text accompanying notes 57, 59, just as precedent-based theories incorporate some form of pragmatism, see *infra* text accompanying note 102.

⁶⁶ See *supra* text accompanying notes 57, 59, 63, 64.

⁶⁷ See *supra* text accompanying note 63.

⁶⁸ See *supra* text accompanying note 64.

⁶⁹ See *supra* text accompanying note 64.

⁷⁰ See *supra* text accompanying note 60.

⁷¹ See *supra* text accompanying note 58.

tolerance, and the pursuit of truth.⁷² It would be arbitrary to criticize any constitutional theory because it is pluralist rather than unitary, or web-like in structure rather than foundationalist. Certainly, no plausible constitutional theory can rely on rigorous deductive reasoning alone. It would also be foolish for a constitutional theory to ignore experience, context, situation, and a sense of "what works." In this, Professor Farber's constitutional pragmatism is all to the good. The theory, however, is not independent and freestanding, but rather omni-dependent on its rival theories at roughly similar analytical levels.

Constitutional pragmatism's omni-dependence tends to involve the opportunistic incorporation of elements of rival theories without much explanation of why, when, and in what proportion elements are borrowed. As we have seen, each of the rival constitutional methods⁷³ is subject to adoption by the pragmatist.⁷⁴ With a bit of re-formulation and prioritization, the rival theories of constitutional decisionmaking provide what the pragmatic theory must have in order to operate in practice. It is close to the essence of Professor Farber's pragmatism that pragmatic constitutionalism does not borrow from the various rival views in a specifically theory-driven way. Pragmatism downplays, if it does not reject, any idea of formula. When the incorporated rival theories⁷⁵ point in different directions, or when the pragmatist must decide whether to incorporate a rival theory, there can only be limited pragmatic theoretical guidance. Since pragmatism relies on judgment⁷⁶ and experience,⁷⁷ when the borrowed elements of any of the various rival theories conflict, "the only possible recourse is to make the best decision possible under the circumstances."⁷⁸

Constitutional pragmatism thus will reflect at least the theorist's or the judge's own common sense, but this itself introduces a certain arbitrariness. What is "best" or what experience teaches may be rather controversial. Consider, for example, Justice Brennan's decision in *Sullivan*, as lauded by

⁷² See Farber & Frickey, *supra* note 36, at 1618–27, 1634–38. Cf. Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1148 (1998) (legal pragmatism as incorporating "our developing aspirations").

⁷³ See *infra* Parts II.A–F.

⁷⁴ See *supra* text accompanying notes 66–72.

⁷⁵ See *supra* text accompanying notes 66–72.

⁷⁶ See *supra* text accompanying note 61.

⁷⁷ See *supra* text accompanying note 62.

⁷⁸ See *supra* text accompanying note 64.

Professor Farber.⁷⁹ Is it pragmatically useful to say that *Sullivan* exemplifies "respect for precedent?"⁸⁰ One could, after all, argue that Justice Brennan's actual malice rule either under- or over- recognizes the precedential strength of a more absolute protection of public criticism of official government conduct.⁸¹

The strength of the claim that *New York Times v. Sullivan* respects precedent depends in part on one's conception of "precedent" and thus on the rival theory of constitutional precedent itself. Justice Brennan's opinion in *Sullivan* illustrates the pragmatist's need for an independent theory of precedent in constitutional cases. His opinion could merely have canvassed Supreme Court holdings for flexible but narrow precedent regarding defamation and related civil or criminal actions brought against media or other defendants by public officials for criticism of their official conduct.⁸² But Justice Brennan's opinion also looked to case precedent in a broader sense, in which prior free speech case law bespeaks "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁸³ Precedent itself could, however, in a given constitutional case easily point in different directions. Certainly, precedent in the narrow sense⁸⁴ need not always accord with precedent in the broad sense.⁸⁵

Considering precedent both narrowly and broadly, Professor Ronald Dworkin's⁸⁶ classic two-part approach to adjudication, for example, is really all about precedent. The first Dworkinian requirement of "fit" or coherence can include either the narrow or both the narrow and broad senses of

⁷⁹ See *supra* text accompanying notes 55-57.

⁸⁰ See *supra* text accompanying note 56. See also text accompanying note 59 (constitutional pragmatism generally as encompassing respect for case precedent).

⁸¹ See *New York Times v. Sullivan*, 376 U.S. 254, 297-98 (1964) (Goldberg and Douglas, JJ., concurring in the result). See also *id.* at 268 n.6. What springs to mind is the dicta from the *Chaplinsky* fighting words case assuming no constitutional limits on state libel law. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Even the presence of sufficient state action or action under color of state law might have been imagined to be debatable. But cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state action via judicial enforcement of private racially restrictive real estate covenants).

⁸² See the cases cited *supra* note 81.

⁸³ *Sullivan*, 376 U.S. at 270. See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986).

⁸⁴ See *supra* note 81 and accompanying text.

⁸⁵ See *supra* note 83 and accompanying text.

⁸⁶ See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

precedent. The second Dworkinian requirement of justifiability or jurisprudential soundness, or making the law the best it can be, represents Brennan's broad sense of precedent.⁸⁷ In this sense, Dworkin's two-part focus on fit and justifiability is really reducible to one approach: precedent.

The pragmatist's reliance on a broad sense of precedent may take the pragmatist into the realm of basic moral and legal rights.⁸⁸ The concern for basic moral rights often serves as a strongly principled, non-pragmatic basis for constitutional decisionmaking.⁸⁹ As precedent in a broad sense may encompass both parts of Professor Dworkin's approach to adjudication, it will also inevitably include non-pragmatic resources upon which constitutional pragmatism wishes to draw.⁹⁰ Just as precedent in a narrow sense may limit the possible judicial outcomes, it may also conflict with broader jurisprudential considerations upon which the constitutional pragmatist will also wish to draw, including basic moral and legal rights.⁹¹

Can the broad and varied dependencies of constitutional pragmatism be limited through the pragmatic scholarship and judicial decisions of Judge Richard Posner?⁹² Judge Posner certainly seeks to limit the dependence of his sort of pragmatism on moral theory. By Judge Posner's own account, "moral theory is useless."⁹³ He claims that his approach relies upon case precedent, clear legal text, and then "on notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public

⁸⁷ See *supra* note 83 and accompanying text. See generally DWORKIN, *supra* note 86, at 49–113, 61 in particular.

⁸⁸ It is, for example, hard to imagine Justice Brennan's celebrated language quoted in text at note 83 *supra* as not invoking the ideas of basic moral and legal rights.

⁸⁹ See *infra* Part II.F.

⁹⁰ See *supra* text accompanying notes 58, 60, 63, 64.

⁹¹ Certainly we might see *Brown v. Board of Education* as involving this conflict. 347 U.S. 483 (1954).

⁹² At this point, the most authoritative formulations of Judge Posner's pragmatism would include RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) and RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999). For commentary, see, e.g., Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998); Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675, 687 (1999) ("Posner's discussion sometimes seems oddly oblivious to notions of human dignity"); Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597 (2000) (reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)).

⁹³ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, at viii (1999).

opinion.”⁹⁴ Judge Posner seeks to rely, where deemed appropriate, on methods of social science, immersion in relevant facts, and various policy considerations. If this sort of constitutional pragmatism has an ultimate aim, it is “to maximize the social utility of the law.”⁹⁵

However, Judge Posner has not succeeded in trimming moral theory, as he himself understands the term, from the list of the rival constitutional approaches upon which the pragmatist crucially depends. For example, maximizing the social utility of the law could come into conflict with elemental fairness and distributional equality under the law. Posner is certainly entitled to always prefer the former over the latter, but he can hardly do so without recourse to some moral theory.

Perhaps Posner sees such judgments as merely a matter of empirical investigation, fact-finding, good science, intuition,⁹⁶ and common sense.⁹⁷ But each of these techniques crucially relies on or implicitly embodies moral theory. Generally, a reasonable defense of any tradeoff between utility and distributional equity requires some basic moral theory.⁹⁸ If pragmatism seeks to maximize the social utility of the law while avoiding all recourse to moral theory, or to grand or high level theory (moral or not), it becomes self-contradictory.

Judge Posner’s multi-factored pragmatism therefore cannot meaningfully reduce the broad dependencies on rival

⁹⁴ *Id.*

⁹⁵ *Id.* at xi.

⁹⁶ Intuitionism is, perhaps not entirely unrelatedly, the name of a recognized approach to moral philosophy. See, e.g., H. A. PRICHARD, *MORAL OBLIGATION* (1949); W.D. ROSS, *THE RIGHT AND THE GOOD* (1930).

⁹⁷ Judge Posner’s common sense is complex, but often bears a sort of conduct-libertarian, John Stuart Mill-type cast in constitutional matters. See *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); see also *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1089 (7th Cir. 1990) (Posner, J. concurring), *rev’d sub nom.* See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). This may well be the best and most defensible form of common sense, but it plainly invites and requires some defense, at the level of moral theory, against different deliverances of “common sense.”

⁹⁸ In fact, the Intuitionists cited *supra* note 96 were especially alert to just this sort of tradeoff, and they would certainly not have endorsed a general unweighted utility-maximizing solution in all cases. For a sophisticated contemporary contribution to the theoretical debate, see generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). See also J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973). We assume that the need for moral philosophy cannot be bypassed merely by changing one’s understanding of utility, welfare, or wealth.

theories of Farber's pragmatism.⁹⁹ Constitutional pragmatism must ultimately assume its place as the single approach to constitutional decisionmaking most thoroughly dependent, logically and practically, on rival theories.¹⁰⁰

B. Case Precedent-Based Theories

Similarly, using precedent to decide constitutional cases inevitably requires a reliance on some other rival theory of constitutional adjudication. In fact, precedent-based theories of constitutional adjudication have the rival-theory dependence problem metaphysically built in at their beginning. Clearly, there can be no infinite series of cases extending backward in time, and the first case in any series of cases could hardly have been decided on the basis of precedent.¹⁰¹ Some other non-precedent-based theory would inescapably be needed to account for at least the first decision. As well, precedent-based theories may also reference and rely crucially on one form or another of pragmatism, thereby creating a disturbing hall-of-mirrors effect.¹⁰² Just as pragmatism may build precedent theory into itself, precedent-based theories may incorporate forms of pragmatism. All things considered, however, precedent-based theories must be ranked as second behind pragmatism in their dependence on rival theories over the typical run of cases.

The Supreme Court confronted the theory of constitutional precedent in the abortion regulation case, *Planned Parenthood v. Casey*.¹⁰³ The *Casey* plurality began by

⁹⁹ Compare text accompanying notes 39–78 (Farber's pragmatism) with text accompanying notes 92–95 (Posner's pragmatism). The above brief account of Posner's adjudicative pragmatism should, for other purposes, be supplemented by the discussion in POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 34, at 59–85, including especially brief summary statements at 59–60 and 84–85 (supplementing what Posner takes to be “the core of pragmatic adjudication – a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities”). *Id.* at 85.

¹⁰⁰ To the extent that one form or another of legal pragmatism rejects or ignores any aspirations to the ideal of objectivity in moral thinking, such matters are briefly addressed *infra* Part III.

¹⁰¹ Cf. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, q. 2, a. 3 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947) (discussing first causes and infinite past series).

¹⁰² See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion). For the opposing phenomenon of pragmatist theories building in the value of precedent, see *supra* text accompanying notes 57, 59.

¹⁰³ 505 U.S. 833 (1992). Interestingly, though, *Casey* is also among the limited number of modern cases that talk explicitly in terms of some constitutional contract or covenant theory, a rival approach to constitutional adjudication, in the context of

observing that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit [N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it."¹⁰⁴ Within the limits of "necessity," or what may amount to avoiding disproportionate costs, there is therefore a range for discretionary reliance on precedent.¹⁰⁵ Addressing the limits of reliance on constitutional precedent, the *Casey* plurality wrote:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, . . . whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling . . . ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, . . . or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification¹⁰⁶

asserting something like a basic natural right to liberty, which in turn raises yet a third possible approach to constitutional adjudication. *See id.* at 901. Justice O'Connor wrote for the plurality:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations [T]he Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

Id.

¹⁰⁴ *Id.* at 854 (O'Connor, J., for the plurality) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)). For discussions of the fundamental value of precedent or *stare decisis* in the rule of the law, see, e.g., *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 494 (1987); *Akron v. Akron Center*, 462 U.S. 416, 419–20 (1982). The idea of "necessity" in this sense may already evoke pragmatist concerns, but we need not insist upon this point.

¹⁰⁵ Every judge who selects a precedent as most relevant must to some degree re-think the scope and value of the precedent case, but this need not involve a thorough re-consideration. As to this crucial precedent selection stage, it has been observed that judges "regularly display amazing ingenuity in 'distinguishing' unfavorable precedents that would otherwise be 'controlling.'" Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2034 (1996). The genuine constraining power of 'precedent' on unsympathetic later judges may thus be limited. *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 83 (1991) (discussing willingness to overrule precedent as part of the Supreme Court's agenda-setting process); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 81 (2001).

¹⁰⁶ *Casey*, 505 U.S. at 854 (O'Connor, J., plurality opinion) (citations omitted).

This suggests that a precedent-based theory of constitutional adjudication must at vital points rely on supplementary principles.¹⁰⁷ Even if a possible case precedent¹⁰⁸ itself indicated when and why we should overrule case precedent, ultimately some supplementary principles, beyond those of precedent, will be required. Such supplementary principles may or may not directly involve any of the major rival approaches to constitutional decisionmaking.

A tendency to respect or to set aside some possible precedent is doubtless partly a matter of politics and personality.¹⁰⁹ As the Court suggested in *Casey*,¹¹⁰ the reasoning underlying either the application or the rejection of some asserted precedent may be nearly as broad as the society's politics itself. This breadth of potential reasoning allows for crucial recourse to other rival theories of constitutional

¹⁰⁷ See *Casey*, 505 U.S. at 854; see *id.* at 944, 955 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("[W]hen it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.") (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), which overruled the recent constitutional precedent of *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (mandatory public school flag salute and pledge of allegiance case)). For a critique of Justice Frankfurter's dissent in *Barnette*, see Michael J. Perry, *Normative Indeterminacy and the Problem of Judicial Role*, 19 HARV. J.L. & PUB. POL'Y 375, 388–89 (1996).

¹⁰⁸ That case itself cannot stand on an infinitely receding series of prior cases, and even if we call the assumed "foundational" case self-evidently or intuitively right, a "self-evidence" theory is thus necessary to supplement the precedent-based theory.

¹⁰⁹ Contrast the attitude toward tradition and precedent in a broad sense between EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Thomas H. D. Mahoney ed., Bobbs-Merrill Co. 1955) (1791) and THOMAS PAINE, *RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION* (Mark Philp ed., Oxford Univ. Press 1995) (1791). Michael Oakeshott, a writer in this respect of Burkinian sympathies, wrote of the Thomas Paine approach in these terms:

[I]f by chance this [political or legal] *tabula rasa* has been defaced by the irrational scribbles of tradition-ridden ancestors, then the first task of the Rationalist must be to scrub it clean; as Voltaire remarked, the only way to have good laws is to burn all existing laws and to start afresh.

MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 9 (1962) (footnote omitted). According to Oakeshott, such a Rationalist "does not neglect experience, but . . . often appears to do so because he insists always upon it being his own experience (wanting to begin everything *de novo*)."*Id.* at 6. But see Hegel's letter to his student Zeilmann observing that the French Revolution "cast off the fear of death and the life of custom." EDWARD CAIRD, *HEGEL* 68 (AMS Press 1972) (1883). For a discussion of Burke on the value of collective legal tradition as opposed to assertions of abstract right, see Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 266–73 (1996). See also Anthony T. Kronman, *Precedent and Tradition*, 90 YALE L.J. 1029, 1047–48, 1066 (1990) (discussing respect for tradition as not merely welfare-maximizing or a matter of fairness, but necessary to our very identity as humans in a culture).

¹¹⁰ See *supra* text accompanying note 106.

adjudication beyond pragmatism,¹¹¹ as well as to considerations not logically tied to any such rival constitutional theory.

For example, textualism¹¹² and original intent¹¹³ theories are relevant in determining how much weight to accord the important constitutional and civil rights precedent of *Hans v. Louisiana*.¹¹⁴ *Hans* has been taken for over a century to bar suits in federal court against unconsenting states,¹¹⁵ despite the fact that the text of the Eleventh Amendment refers explicitly only to suits by citizens of another state.¹¹⁶ This has led some to conclude that "we have two Eleventh Amendments, the one ratified in 1795, and the other (so-called) invented by the Court nearly a century later in *Hans*"¹¹⁷ This amounts to a possible conflict between text and precedent, rather than a renewed application of precedent that depends upon textualism. But, notably, deciding whether to apply or overrule case precedent, as in *Hans*, depends partially on constitutional text and on textualist theories of constitutional adjudication.

An originalist approach to constitutional adjudication, on the other hand, could be called upon to uphold the precedential status of *Hans*. For some judges, *Hans* was both rightly decided on the merits and then properly upheld as precedent by virtue of an original constitutional intent to uphold state sovereign immunity.¹¹⁸ There is, in addition, a

¹¹¹ See *supra* text accompanying note 102.

¹¹² See *infra* Part II.C.

¹¹³ See *infra* Part II.D.

¹¹⁴ 134 U.S. 1 (1890).

¹¹⁵ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

¹¹⁶ See *id.*; Mark Strasser, *Hans, Ayers and Eleventh Amendment Jurisprudence: On Justification, Rationalization and Sovereign Immunity*, 10 GEO. MASON L. REV. 251, 251 (2001) ("*Hans* held that the Eleventh Amendment precluded citizens from suing their own states, lack of express language in the Amendment to that effect notwithstanding.").

¹¹⁷ *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring) (overruled by *Seminole Tribe*)). Note that the constitutional status of *Hans* can be bolstered by the claim that some degree of respect for the rule of *stare decisis* is not merely sound jurisprudential policy, but required by the Constitution or the Framers' intent embodied therein. See Thomas Healy, *Stare Decisis As a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001). For an argument that *stare decisis* may actually undermine constitutional due process requirements, see Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

¹¹⁸ See *Seminole Tribe*, 517 U.S. at 54 (explicitly opposing the text of the Eleventh Amendment to what the amendment presupposes). See also *Alden v. Maine*, 527 U.S. 706, 724 (1999) (discussing *Hans* and constitutional understandings in disallowing a congressional attempt to subject unconsenting states to suit even in their own state courts).

certain natural law flavor to some of the language in *Hans*,¹¹⁹ reflecting particular natural law theories of constitutional decisionmaking that are distinct from those based on precedent.¹²⁰ But the relevant natural law language in *Hans* and elsewhere¹²¹ seems intended to defend the result in *Hans* on the merits, rather than to sustain the continuing vitality of *Hans* on the basis of its status as a precedent.

In other contexts, though, the defensibility of following constitutional precedent may more directly depend upon rival constitutional theories of natural law or natural rights. Precedent cases may induce various kinds of reliance, and overruling precedent may therefore impose various kinds of hardship,¹²² which may be objected to, among other grounds, as violations of natural law.¹²³ For example, in *Casey*, the plurality found that reliance on *Roe v. Wade* weighed in favor of sustaining a woman's right to have an abortion. The Court explained "that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."¹²⁴ Additionally, the strong precedential value of a case may be deeply accounted for by the precedent being somehow incorporated into our ongoing constitutional contract,¹²⁵ yet another rival theory of constitutional decisionmaking.¹²⁶ Reliance on a case precedent, after all, may stem from a sense that the government and the public have agreed on some tax or social security principles inviting sacrifice today for some benefit tomorrow.

In various respects, then, a case-precedent-based theory of constitutional decisionmaking generally involves crucial,

¹¹⁹ See *Seminole Tribe*, 517 U.S. at 54 (referring to "the nature of sovereignty"). See also *id.* at 69.

¹²⁰ See *infra* Part II.F.

¹²¹ See, e.g., *Alden*, 527 U.S. at 724; *Seminole Tribe*, 517 U.S. 44; Barrett, *supra* note 117.

¹²² See *supra* text accompanying note 106.

¹²³ Cf. LON L. FULLER, *THE MORALITY OF LAW* 39–40 (1964) (discussing appropriate respect for induced reliance and expectations as part of the internal morality of the law).

¹²⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (O'Connor, J., plurality opinion).

¹²⁵ See, e.g., *Casey*, 505 U.S. at 901; see also *supra* text accompanying note 103.

¹²⁶ See *infra* Part II.E.

immediate dependencies on rival theories.¹²⁷ It is typically difficult for full arguments for or against applying a given case precedent to be developed without essential reference to a rival theory of constitutional decisionmaking. *Casey* has shown that the positive or negative value of constitutional precedent can take many forms. These include considerations of prudence and pragmatism,¹²⁸ rule of law values,¹²⁹ costs,¹³⁰ workability,¹³¹ special hardship,¹³² and changes in related law¹³³ and social fact or sentiment.¹³⁴ The Court has elsewhere recognized that in a proper case, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."¹³⁵ The Court has also concluded that "[a]dhering to precedent 'is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'"¹³⁶ The primary concern is not with whether the courts are right in defending reliance on precedent for such reasons.¹³⁷ Rather, the above sorts of reasons for adhering to

¹²⁷ See *supra* text accompanying notes 100–23.

¹²⁸ See *supra* text accompanying note 106.

¹²⁹ See *supra* text accompanying note 106.

¹³⁰ See *supra* text accompanying note 106.

¹³¹ See *supra* text accompanying note 106.

¹³² See *supra* text accompanying note 106.

¹³³ See *supra* text accompanying note 104. See also Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1264 (1990).

¹³⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (O'Connor, J., plurality opinion); Sherry, *supra* note 133, at 1264.

¹³⁵ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986)).

¹³⁶ *Id.* at 827 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). See also Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 49 (1989) ("For various reasons, primarily those concerned with the informational and motivational limitations human decisionmakers face, adherence to rules even when the rules dictate incorrect results . . . may achieve more value and thus be more 'correct' than deciding each case 'correctly.'").

¹³⁷ Compare Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585 (2001), with Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 602 (1987). Fallon argues:

[A] good legal system requires reasonable stability; . . . while decisions that are severely misguided or dysfunctional should be overruled, continuity is presumptively desirable with regard to the rest; . . . it would overwhelm Court and country alike to require the Justices to re-think every constitutional question in every case on the bare, unmediated authority of constitutional text, structure, and original history.

Fallon, Jr., *supra*, at 585. Schauer's position, however, is somewhat different:

precedent, particularly in constitutional cases,¹³⁸ ordinarily involve reliance on some rival theory of constitutional decisionmaking.

But perhaps both constitutional pragmatism and precedent-based approaches to constitutional decisionmaking are not merely dependent upon rival constitutional theories. Perhaps, pragmatism or precedent-based constitutional theory swallows up all that is of value in one or more rival constitutional theories. Can pragmatist constitutional theory or precedent-based theory rehabilitate its independence by showing that they actually incorporate all that is valuable in their rival theories, rather than merely being dependent upon such rival theories?

If there are any grounds to suppose that pragmatism could simply engulf precedent-based or other theories, they would flow from the eclecticism and the openness of pragmatist theory.¹³⁹ Professor Farber's pragmatism is open to drawing upon "the full range"¹⁴⁰ of our cognitive abilities in resolving problems, at least beyond what he calls deductivism¹⁴¹ or foundationalism.¹⁴² While for Farber's pragmatism, experience is a touchstone,¹⁴³ experience is decisive only in some ultimate sense, rather than as a narrow methodological constraint.¹⁴⁴ Farber is open to a range of (typically small-scale) approaches that might alone or in combination solve a constitutional

Without a universal answer to the question of whether stability is a good thing, we cannot decide whether decision according to precedent is a good thing. Stability may be unimpeachable in the abstract, but in reality stability comes only by giving up some of our flexibility to explore fully the deepest corners of the events now before us. Whether this price will be worth paying will vary with the purposes to be served within a decisional domain.

Schauer, *supra* at 602.

¹³⁸ It is typically assumed that the weight of *stare decisis* will commonly be low in constitutional cases, given the difficulty of overturning an unpopular constitutional decision of the Supreme Court via constitutional amendment. See *Payne*, 501 U.S. at 808 (quoting *Burnet*, 285 U.S. at 407 (Brandeis, J., dissenting)). One could, however, argue that we should be especially reluctant, perhaps on grounds of natural rights or judicial integrity, to overrule constitutional precedents protecting basic liberties or minority interests. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 705–06 (1999) (discussing the views of Justice Thurgood Marshall).

¹³⁹ See *supra* text accompanying note 39. Whether Judge Posner's version of constitutional pragmatism actually encompasses distinctively moral argumentation is subject to dispute. See *supra* text accompanying notes 93–98.

¹⁴⁰ See *supra* text accompanying note 48.

¹⁴¹ See *supra* text accompanying notes 44–46.

¹⁴² See *supra* text accompanying notes 42, 45–46.

¹⁴³ See *supra* text accompanying note 62.

¹⁴⁴ See *supra* text accompanying note 62.

problem, and the list of such approaches includes "anything else"¹⁴⁵ that might help.

On the other hand, Professor Farber's inclusiveness is in some respects limited, which gives his pragmatism in turn a distinct and limited character. Specifically, Farber seeks to avoid "ad hoc"¹⁴⁶ eclecticism, or an unprincipled, omnivorous theory. As such, high level or grand theoretical considerations,¹⁴⁷ along with deductivism and foundationalism, and some forms of rationalist intuitionism, are to be avoided as well.¹⁴⁸ Ultimately, then, Farber's constitutional pragmatism cannot deliver the entire scope and value of either precedent-based or any other major theory of constitutional decisionmaking.¹⁴⁹ Rival theories will always offer options, depths, and priorities that neither pragmatism nor precedent-based theories will want to adopt.

One further way to show the "indigestibility" of entire rival theories involves a Kantian or right-based "deontic"¹⁵⁰ critique of Professor Farber's theory. Suppose Farber's pragmatic constitutionalist concludes that some given constitutional outcome "works" in the pragmatic sense. A deontic critic could reply that even if the constitutional decision somehow "works" in Farber's pragmatic sense, the decision is nonetheless morally wrong and thus morally unacceptable in such a way that renders the decision unconstitutional, or at least not the best constitutional outcome.

This does not necessarily mean that Professor Farber's pragmatic approach fails in such a case, or that Farber's theory is generally insensitive to deontic considerations.¹⁵¹ Rather, the point is that Farber's pragmatism cannot simply incorporate

¹⁴⁵ See *supra* text accompanying note 64.

¹⁴⁶ See *supra* text accompanying note 40.

¹⁴⁷ See *supra* text accompanying note 38.

¹⁴⁸ See *supra* text accompanying notes 42-46.

¹⁴⁹ Many natural law or natural rights-based theories, along with many constitutional contractarian theories, will be more open to grand or high level theory, for example, than is Farber's pragmatic theory. For a discussion see *infra* Part II.E-F.

¹⁵⁰ See, e.g., SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 2 (1982); Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2209-11 (1992); Philip Pettit, *Consequentialism and Respect for Persons*, 100 ETHICS 116, 117 (1989). See generally Heidi M. Hurd, *What In the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157 (1994).

¹⁵¹ Consider the apparently deontic thrust of Farber's critique of fellow pragmatist Judge Richard Posner: "Posner's discussion sometimes seems oddly oblivious to notions of human dignity. . . ." Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675, 687 (1999).

bodily such a broad deontic critique without distortion. Constitutional pragmatism can swallow its rivals only by distorting what its rival theories claim, or by contorting itself to fit in all of its rivals. Realistically, as crucially dependent upon their rivals as both pragmatism and precedent-based theories are, neither can clear the field by claiming that everything of value in all rival theories can be brought within the scope of either pragmatist or precedent-based theories.

C. *Textualist Theories*

Following constitutional pragmatism and precedent on the dependency continuum is textualism. Textualism as an approach to constitutional decisionmaking comes in various forms and strengths. Strong versions consider the text as the sole source of legitimate constitutional decisionmaking, with everything outside the text merely shedding more or less light on the text¹⁵² and its meaning.¹⁵³ It has been argued that "the text itself is an obvious starting point of legal analysis,"¹⁵⁴ and that arguments from the constitutional text are of "the foremost authority."¹⁵⁵ Weaker versions consider the text as merely the primary source,¹⁵⁶ and sometimes not even the most useful source¹⁵⁷ of legitimate constitutional decisions. But in

¹⁵² See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1171 n.188 (1987) (citing the work of Professor Thomas Grey).

¹⁵³ E.D. Hirsch distinguishes between 'meaning,' the fixed and unaltered expression of the author's intent, and 'significance,' a broader idea incorporating a wider range of situations and actors. See E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* 8 (1967). For a rather more extensive cataloguing of definitions of meaning, see C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING* 186-87 (Harcourt Brace Jonanovich 1989) (1923).

¹⁵⁴ Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998).

¹⁵⁵ Richard H. Fallon, Jr., *A Constructivist Coherentist Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194 (1987).

¹⁵⁶ See Sherry, *supra* note 152, at 1171 n.188. See also Fallon, Jr., *supra* note 155, at 1193-94 ("[T]he implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers' intent, constitutional theory, precedent, and moral and policy values."). For arguable reversals of this ranking, see cases relying upon the independent agency case of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Note that Professor Fallon's theory seeks to place a distinct category of precedent, between what one might otherwise think of as adjoining categories: constitutional theory, and moral and policy values.

¹⁵⁷ See Fallon, Jr., *supra* note 155, at 1194 (claiming that in hard cases, high ranked textualist arguments are actually "least likely to prove uniquely persuasive or determinate").

contrast it has been argued, too strongly but not without point, that there is really no such thing as textualism.

Regardless, while the text may appear to play some role in interpretation, textualism may mask the role of other forces at work.¹⁵⁸ This section shall focus on forms of constitutional textualism defined broadly enough to be of some use, but not so broadly as to build rival constitutional theories into the very definition of textualism. Textualism set adrift from anyone's intent, purpose, or circumstance may well practically amount to "nothing." Indeed, there is some logic in uniting textualism and some form of original intent into a single constitutional theory.¹⁵⁹ This section, however, will treat the relations between textualism and other constitutional theories as matters to be discovered or decided, rather than as matters of pure definition.¹⁶⁰

To begin, it is important to note that although the constitutional text may provide "an obvious starting point"¹⁶¹ for constitutional decisionmaking, the authority of the text itself¹⁶² is not self-evident and beyond argument. Despite the familiarity of appeal to the constitutional text, H. Jefferson Powell has emphasized the problem of constitutional textual authority across an extended period of time. He has argued that:

Nowhere else in space or time, except where our example has been followed, have women and men claimed to resolve the most basic questions of political morality through exegesis of the aging work product of a committee adjourned two centuries ago. There is nothing self-evident, to me at any rate, about such an odd tribal custom.¹⁶³

¹⁵⁸ Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 *FORDHAM L. REV.* 2393, 2397 (2001). In the abstract, the "other forces" might include rival constitutional theories.

¹⁵⁹ Professor Michael Perry, for example, distinguishes between textualist and non-textualist approaches to constitutional adjudication, preferring the former, and then distinguishes between originalist textualism and non-originalist textualism, again preferring the former. See Michael J. Perry, Brown, Bolling, & *Originalism: Why Ackerman and Posner (among Others) Are Wrong*, 20 *S. ILL. U. L.J.* 53, 54 (1995). See also HIRSCH, *supra* note 153, at 1 (referring to "the sensible belief that a text means what its author meant").

¹⁶⁰ As we shall see in Part II.D. *infra*, the dependency relations between textualist theories and originalist theories are, to some degree, reciprocal rather than one-directional.

¹⁶¹ See *supra* note 154 and accompanying text.

¹⁶² See *supra* note 155 and accompanying text.

¹⁶³ H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 *IOWA L. REV.* 1427, 1428 (1986) (footnotes omitted). Professor Powell

If Professor Powell's concerns are answerable at all, they are best answered not only through the text itself, but through thinking about the ways in which constitutional textualism depends upon rival theories of constitutional decisionmaking. In order to attempt to legitimize textualism through textualism's relationships to rival theories, the most useful focus is actually not on the closely related original intent theory. Thinking about the intent of the original drafters or ratifiers will make little progress in explaining why the constitutional text might be authoritative over time. In this respect, textualism and original intent theory are "too close," and share too many assumptions. An original intent focus seems to merely raise Professor Powell's question in a somewhat different way.

Thus, this section focuses on ways in which textualism depends upon some sort of constitutional contractualist theory,¹⁶⁴ or upon some natural law or natural rights-based theory.¹⁶⁵ A text typically cannot establish its own moral bindingness merely by self-proclamation or by other exclusively internal evidence. Any text, after all, could claim to be morally or legally binding. But, on the other hand, a central function of a genuinely valid contract is to exert its authoritativeness across time.¹⁶⁶ And it is characteristic as well of some natural law or natural rights theories that certain general rights

concludes that "[b]y defining a common political idiom for a morally pluralistic society, by conserving the achievements of the past, and above all, by its power to provoke us to new insights, the Constitution-as-historical-document has justified the central place we give it in our political discourse." *Id.* at 1434–35. How the text of the equal protection, due process, or privileges and immunities clauses have themselves steered us toward their own best interpretation is unclear. For further development of Professor Powell's point, see David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1719 (2003) ("[T]he text of the Constitution provides a common ground among people, and in that way it facilitates the resolution of disputes that might otherwise be intractable. Sometimes . . . it is more important that things be settled than that they be settled right, and the provisions of the Constitution settle things.").

¹⁶⁴ See *infra* Part II.E.

¹⁶⁵ See *infra* Part II.F. See also Douglas W. Kmiec, *Natural-Law Originalism – Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J.L. & PUB. POL'Y 627, 627 (1997).

¹⁶⁶ See, e.g., *Interlaken Serv. Corp. v. Interlaken Condominium Ass'n*, 587 N.W.2d 456, 1998 WL 692837, at *5 (Wis. Ct. App. 1998) ("The purpose of a contract is to provide the parties with certainty and stability despite future events.") (emphasis added). Of course, certainty and stability in the law, constitutional and otherwise, is promoted not just by otherwise valid contracts, but by precedent as well, as noted in our discussion of precedent-based theories of constitutional interpretation. See *supra* Part II.B.

persist across time.¹⁶⁷ Only when constitutional textualism looks to these and other¹⁶⁸ rival theories for vital supplementation does the possible binding authority of a text across time make maximum sense.

Some hints as to possible dependencies of textualism on rival constitutional theories can be gathered from the cases in which the constitutional text is de-emphasized.¹⁶⁹ As seen in connection with precedent-based theories,¹⁷⁰ the Supreme Court de-emphasized the importance of the text of the Eleventh Amendment in *Hans v. Louisiana*¹⁷¹ and succeeding cases.¹⁷² A textualist theory that seeks to account for *Hans* would have to incorporate crucial elements of original intent theory¹⁷³ or natural law theory,¹⁷⁴ focusing in this context on the breadth and importance of state sovereignty. But a textualist theory broad enough to incorporate all the needed elements of these rival constitutional theories risks no longer being distinctively textualist.

Some tendency in the direction of a more plausible but no longer distinctive textualism is seen in the First Amendment opinions of Justice Black.¹⁷⁵ Justice Black's supposed literalist textualism¹⁷⁶ is in fact selective. The First Amendment language of "Congress,"¹⁷⁷ as a potential limitation on the scope of the amendment, is not taken literally, for

¹⁶⁷ See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351 (Clarendon Press 1999) (1980) (underlying general natural principles as at that level unchanging over time). Aquinas discusses the question of change in the natural law in AQUINAS, *supra* note 101, at q. 94, a. 5.

¹⁶⁸ One could certainly argue as well that a further contributor to any sense of the legitimate bindingness of a given constitutional text over time is the continuity of the case law interpreting that text, with any possible reliance induced thereby. This is of course the province of precedent-based theories of constitutional decisionmaking. See generally *supra* Part II.B; see also *supra* text accompanying note 166.

¹⁶⁹ We must again bear in mind, though, that a court could de-emphasize the constitutional text for reasons not directly tied to any rival theory of constitutional decisionmaking.

¹⁷⁰ See *supra* notes 114–21 and accompanying text.

¹⁷¹ 134 U.S. 1 (1890).

¹⁷² See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

¹⁷³ See *supra* note 118 and accompanying text.

¹⁷⁴ See *supra* notes 119–20 and accompanying text.

¹⁷⁵ See in particular Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) ("The phrase 'Congress shall make no law' is composed of plain words, easily understood.").

¹⁷⁶ See *id.*

¹⁷⁷ See U.S. Const. amend. I.

example.¹⁷⁸ Of all the major constitutional theories, textualism has the least to say about why "Congress" should include the federal executive and judicial branches. A textualism that crucially reads "Congress" to include the two other federal governmental branches, however plausibly, is really not distinctively textualist.

This point is not confined to First Amendment textualism, or to Justice Black. A reasonably narrow or distinctively textualist theory can, for example, account for the result in *Brown v. Board of Education*¹⁷⁹ on Fourteenth Amendment equal protection grounds. But only a much broader and far less distinctively textualist theory can reasonably account for a similar result, on Fifth Amendment due process grounds, in *Brown's* federal companion case of *Bolling v. Sharpe*.¹⁸⁰ The text of the Fifth Amendment, after all, does not offer much of an equal protection clause. Thus, familiar versions of constitutional textualism "must develop mediating principles"¹⁸¹ of one sort or another, often crucially relying on rival constitutional approaches.¹⁸²

This reliance on rival theories cannot be avoided by recognizing that a text may not be "crystal-like,"¹⁸³ and may actually operate as "a network of different messages depending on different codes and working at different levels of

¹⁷⁸ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring) ("In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment."). See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 142–43 (1951) (Black, J., concurring) (arguing that a blacklist prepared pursuant to Executive Order as objectionable on several grounds, including as censorship irreconcilable with the First Amendment).

¹⁷⁹ 347 U.S. 483 (1954).

¹⁸⁰ 347 U.S. 497 (1954). For discussion of the distinction between constitutional textualists and supplementers, see Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4 (1984). One could certainly argue that the major hurdle in *Bolling* was the original intent of the Fifth Amendment Framers rather than the text itself, but any fully satisfactory textualist approach to *Bolling* would have to borrow some combination of rival theories, including even a sense of natural law or natural rights. See *Bolling*, 347 U.S. at 500 (labeling it "unthinkable" that segregated schools could be prohibited at state but not at federal level). See also *id.* at 499 (pointing to equal protection and due process as "both stemming from our American ideal of fairness Discrimination may be so unjustifiable as to be violative of due process.").

¹⁸¹ *Payne v. Tennessee*, 501 U.S. 808, 853 n.3 (1991) (Marshall, J., dissenting).

¹⁸² See *id.* (departing from case precedent in favor of one reading of an ambiguous text as requiring some set of mediating principles).

¹⁸³ UMBERTO ECO, *THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS* 5 (1984).

signification."¹⁸⁴ The vagueness and ambiguity of the constitutional text creates not just possibilities for textualism, but problems for textualism as well. Textualism thus requires crucial supplementation. We need not argue that the text of the Constitution is open to just any appealing interpretation.¹⁸⁵ But crucial phrases in the Constitution are remarkably compressed, and compression can result in crucial ambiguity.¹⁸⁶ The problems of ambiguity are sometimes best resolved through supplementation by some other theory, apart from further complications or refinements of textualism.

Consider the implications of a concise survey by the well-known literary theorist and critic William Empson:

[A] word may have several distinct meanings; several meanings connected with one another; several meanings which need one another to complete their meaning; or several meanings which unite together so that the word means one relation or one process. . . . 'Ambiguity' itself can mean an indecision as to what you mean, an intention to mean several things, a probability that one or other or both of two things has been meant, and the fact that a statement has several meanings.¹⁸⁷

¹⁸⁴ *Id.* This general description seems apt regarding texts such as the tersely formulated Free Speech Clause, the Equal Protection Clause, or the Fourteenth Amendment generally.

¹⁸⁵ *But cf.* David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1157 (1998) ("The Constitution is phrased in such broad terms that a judge who adheres simply to the text can do essentially anything he or she wants."); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 685 (1985) ("[E]very version of textualism licenses a judge to require anything from laissez faire to socialism."). For background, see the middle-of-the-road approach taken in UMBERTO ECO, *THE LIMITS OF INTERPRETATION* 24 (1990).

On one side it is assumed that to interpret a text means to find out the meaning intended by its original author or – in any case – its objective nature or essence, an essence which, as such, is independent of our interpretation. On the other side it is assumed that texts can be interpreted in infinite ways. Taken as such, these two options are both instances of epistemological fanaticism.

Id. See also *id.* at 21 ("[M]odern interpreters are wrong in taking every text as an unshaped world . . ."). In the legal as well as broader literary context, see Stanley Fish, *How Come You Do Me Like You Do? A Response to Dennis Patterson*, 72 TEX. L. REV. 57, 62 (1993). ("As a Miltonist or a teacher of contracts, I am never in the position of deciding what 'counts' as a constraint because the possible routes of decision are marked out for me in advance by a disciplinary history I could not ignore without opting out of the discipline altogether.").

¹⁸⁶ See WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* 31 (New Directions 1966) (1930).

¹⁸⁷ *Id.* at 5–6 (footnote omitted). One could, in the constitutional sphere, easily argue that texts or text-fragments such as "equal" or "equal protection of the laws" could exemplify each of these listed possibilities. For what is arguably the best sorting

Common experience suggests that each of these possibilities inheres not only in the text of the Fourteenth Amendment,¹⁸⁸ but at strategic points throughout the text of the Constitution.

Unless constitutional textualism is defined in a remarkably broad way, even a well-developed constitutional textualist theory is incomplete. A textualist could, in theory, broaden the scope of textualism by maintaining that the text itself somehow includes all of its own context. Such a remarkable broadening can be supported by the conclusions of literary deconstructionists¹⁸⁹ as well as of sitting federal appellate judges.¹⁹⁰

The idea of context is itself ambiguous, and if defined broadly enough would encroach on or borrow from rival theories of constitutional decisionmaking. A text, by itself, is not sufficient to establish much social meaning or "significance" in Professor Hirsch's terms.¹⁹¹ We cannot first merely read a constitution or other text, and only then begin a process of interpreting the text.¹⁹² Hans-Georg Gadamer observes that "[w]hen one brings a text to speak through reading . . . one takes up the meaning that resides in the line of meaning which the reader himself or herself has already opened up."¹⁹³

out of various kinds and degrees of distributional equality, see LARRY S. TEMKIN, *INEQUALITY* (1983).

¹⁸⁸ See *supra* text accompanying note 187.

¹⁸⁹ See Ronald K. L. Collins, *Outlaw Jurisprudence?*, 76 TEX. L. REV. 215, 238 (1997) (reviewing DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA) ("[N]o self-respecting deconstructionist would grant the text-context distinction, particularly if – as in . . . constitutional law – the controlling assumption is that text governs . . .").

¹⁹⁰ See Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122–23 (1998) (depicting Chief Justice John Marshall as a textualist, and in particular as a textualist who avoided relying on "imputed intent," or the drafting and ratifying debates, or case precedent, or the *Federalist Papers*, but who nonetheless did rely on "the context that gives text meaning"). It is unclear why the context that gives meaning could not include much of what Chief Justice Marshall is said to have avoided relying on.

¹⁹¹ See Farber, *supra* note 151. See also Stanley Fish, *Response: Interpretation Is Not a Theoretical Issue*, 11 YALE J.L. & HUMAN. 509, 510 (1999) ("[T]he words [of a text] will only say what they will say in the light of an intention, and will say different things in the light of different intentions.").

¹⁹² See HANS-GEORG GADAMER, *Reflections on My Philosophical Journey*, in THE PHILOSOPHY OF HANS-GEORG GADAMER 3, 53 (Richard E. Palmer trans., Lewis Edwin Hahn ed., Open Court 1997) ("[R]eading itself is already an interpretation of what is meant . . .").

¹⁹³ *Id.* See also William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 613 (1990) (Gadamer's approach as suggesting "that we do not discover the truth of the [statutory text] provision by limiting our vision to the bare text, or to the original legislative expectations, or to current policy. All of these

A textualist could conceivably embrace all of this creativity by different readers at different times and circumstances as part of textualism itself. But this would be an unusual approach for a constitutional textualist. As a practical matter, much of the interest in textualism is as an alternative to, not an embodiment of, this sort of unfinished,¹⁹⁴ perpetually "evolving," "living," diversely readable Constitution.¹⁹⁵ Leading constitutional textualists, such as Justice Scalia,¹⁹⁶ inevitably find that they are driven beyond their own conception of textualism to somehow embrace what amount to rival theories of constitutional decisionmaking as well. Justice Scalia may, for example, begin and in some instances end, with the constitutional text.¹⁹⁷ But his textualist theory is, of necessity, quickly supplemented by various considerations, some of which amount to or involve rival approaches to constitutional decisionmaking. Justice Scalia recurs, where appropriate, to "tradition,"¹⁹⁸ which may encompass judicial precedents.¹⁹⁹ At

perspectives work together, and each teaches us something."); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 137 (1985) (Gadamer's approach as arguing that "a sharp distinction cannot be drawn between understanding the text in its own terms and reading the interpreter's concerns into it"); Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 535-36 (1988) ("No text has an essential meaning; instead the text is appropriated continually by historically situated readers."). See also TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 60-64 (Univ. of Minnesota Press 2d ed. 1996) (on Gadamer and Hirsch).

¹⁹⁴ See JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD* 14 (1985) ("The text is an unfinished process, one that is continually completed in the history of its being understood.").

¹⁹⁵ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) ("[T]he Constitution is not a static document whose meaning in every detail is fixed for all time by the life experience of the Framers."). See generally Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a Living Constitution*, 139 U. PA. L. REV. 1319 (1991).

¹⁹⁶ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-25 (1997). For Justice Scalia's approach to what he distinguishes from textualism as originalism, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For further distinct emphasis on the constitutional doctrine of textualism and related judicial tests, see *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring). For a rather different, more general defense of the Constitution as a document, as opposed to judicial doctrine, see Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

¹⁹⁷ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]he text of the Constitution, and our traditions, say what they say and there is no fiddling with them.").

¹⁹⁸ *Id.*

the constitutional level, Justice Scalia appeals to “legislative history,”²⁰⁰ presumably in search of some version of original intent.²⁰¹

More generally, textualists are inclined to “overrule” what they take to be the evident meaning of a text in order to avoid what the textualist – on some grounds other than textualism – considers a bizarre or absurd result.²⁰² Textualists supplement, if not displace or reverse, the text with “propositions of policy, morality, and experience.”²⁰³ Much policy, morality, and experience will bear only an indirect relation to any rival, non-textualist constitutional theory, but much will be central to and depend crucially on one or more natural law or natural rights theories.²⁰⁴ In this final respect, then, textualism will again be dependent on its own rival views.

D. Original Intent-Oriented Theories

The next theory or family of theories in the dependency continuum is Originalism. Original intent-oriented theories of

¹⁹⁹ See, e.g., *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”).

²⁰⁰ See, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1515 (1998); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990) (“Justice Scalia himself uses legislative history when interpreting the Constitution.”).

²⁰¹ See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (McConnell sympathetically states, “Justice Scalia . . . interprets the text in light of three supplemental jurisprudential principles: originalism, traditionalism, and restraint.”).

²⁰² See Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 27 (1995).

²⁰³ See *id.* at 28.

²⁰⁴ See *infra* Part II.F. One cannot avoid the problem of justifying reliance on a constitutional text by announcing that such a text, once it is somehow identified and distinguished from mere pretender texts, just is the self-evident, indemonstrable, rock-bottom foundation of constitutional law. But see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383 (1981) (critiquing Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980)). One could hold that the written Constitution is or is not morally legitimate generally, or with regard to particular groups of persons, either because of the process by which the Constitution was adopted, or because of the document’s substantive moral character. On such a view, the text, and textualist interpretations, might well require supplementation by a deeper contractarian or natural law and natural rights constitutional theory. For background, see Randy E. Barnett, *An Originalism For Nonoriginalists*, 46 LOY. L. REV. 611, 639–41 (1999).

constitutional decisionmaking take many forms,²⁰⁵ including some forms that are barely, if at all, distinguishable from a form of textualism.²⁰⁶ Given the mutual relationships and dependencies among some forms of textualism and originalism, it is fair to ask why we have ranked textualism as, in general, more dependent upon its rival theories than originalism.

Originalism can for our purposes be viewed as an attempt to provide necessary underpinnings, or an underlying logic, for textualism. In particular, originalism serves as an attempt to answer why we should be bound by a text, or by this text in particular. Any text can label itself, or be labeled by a person, as a "constitution." Any text can expressly insist that it is binding in all respects on all persons under all times and circumstances.²⁰⁷ Originalism offers an answer, adequate or inadequate, to this sort of problem that cannot be resolved by appeal to the text itself.

As it turns out, however, the major forms of originalism are at worst unsuccessful or unnecessary in validating the constitutional text,²⁰⁸ and at best dependent upon rival contractualist views,²⁰⁹ which are in turn dependent upon rival natural law or natural rights views.²¹⁰ It is possible, however, to develop an originalist theory that bypasses dependence upon a

²⁰⁵ See, e.g., Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407 (2003) (reviewing RICHARD H. FALLON, JR., *OVERCOMING THE CONSTITUTION IMPLEMENTING THE CONSTITUTION* (2001) (distinguishing originalism as a method of interpreting the Constitution versus originalism as the Framers' actual Constitution with all its defects); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) (strict originalism versus moderate or high level abstraction-of-intention originalism); James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849, 1854 (1997) ("ancestral" or traditionalist originalism versus "heroic" or "aspirational" originalism); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 676-77 (1991) (distinguishing, as in contract law, between objective or public principled meaning originalism and subjective actual intentions originalism).

²⁰⁶ See, e.g., Utah v. Evans, 536 U.S. 452, 488, 491 (2002) (Thomas, J., concurring in part and dissenting in part) ("We should be guided . . . by the Census Clause's original meaning, for the Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.") (internal quotations omitted) (ultimately quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

²⁰⁷ Just as, by way of analogy, a written contract might by its own express terms insist that no signatory was under duress, or a will might expressly assert that the testator was under no constraint. The question of duress or constraint cannot, of course, be so easily suppressed.

²⁰⁸ See *infra* Part II.E-F.

²⁰⁹ See *infra* the remainder of Part II.D.

²¹⁰ See *infra* Part II.E.

contractualist constitutional theory, and that instead depends solely upon some sort of natural law or natural rights-based approach to the Constitution. But historically, originalist theories commonly depend on constitutional contractualist theories,²¹¹ which in turn depend more directly on natural law or natural rights-based constitutional theories.²¹²

Originalist theories of constitutional decisionmaking have been assessed in a remarkably broad range of ways, running from accusations of near incoherence or impossibility²¹³ to winning credit for distinctively upholding the values of judicial restraint²¹⁴ and democratic legitimacy.²¹⁵ Our primary interest, however, is not in an overall assessment of the merits of any form of originalism. Rather, this section addresses the nature and extent of originalism's dependencies on rival normative theories of constitutional decisionmaking.

First, let us bypass some complications. Assume that we can identify who counts, or whose intentions count, and how much, for original intent purposes.²¹⁶ Merely for the sake of

²¹¹ See *infra* the remainder of Part II.D.

²¹² See *infra* Part II.E.

²¹³ See, e.g., Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 661–62 (1985) (on the impossibility of a narrow, strict, literal, author-determined originalism, as opposed to a moderate, hermeneutic, or reader-contributory originalism). See also Robert W. Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 648 (1985) (“Originalism is, if not exactly incoherent, an utterly impoverished way of thinking about constitutional law. While many serious scholars consider themselves originalists, none actually embraces the dogma in the artificial form that might make it coherent.”). See Daniel A. Farber, *The Originalism Debate: A Guide For the Perplexed*, 49 OHIO ST. L.J. 1085, 1087 (1989) (raising the possibility for discussion that “originalism is inherently self-contradictory because the original intent was that judges would not use originalism”). See also Michael Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 364, 367 (1988) (referring to the argument that “you could not possibly find the framers’ intentions, even if you wanted to”). See generally Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 845 (1991) (“As modern political and interpretive theories rightly and constantly claim, we will never know the intent of the legislature.”). But see generally E.D. HIRSCH, JR., *THE AIMS OF INTERPRETATION* 8 (1976) (In general, “[t]he reader should try to reconstruct the authorial meaning, and he can in principle succeed in this attempt.”). For a response to Hirsch, see Eagleton, *supra* note 193, at 60 (“Hirschian theory is quite unable to justify its own ruling values.”).

²¹⁴ See *infra* note 222 and accompanying text.

²¹⁵ See *infra* note 228 and accompanying text.

²¹⁶ See, e.g., Kent Greenawalt, *Are Mental States Relevant For Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1641–42 (2000) (raising basic problems of concept and classification). See also *Lamont v. Woods*, 948 F.2d 825, 839 (2d Cir. 1991) (taxpayer Establishment Clause case) (“[I]t is perilous to speak of an overall ‘intent’ of the Framers as if they were a cohesive group. One historical fact is clear: the Bill of Rights was demanded by the party that opposed the document as a whole.”).

convenience, we will refer to this group, including framers, ratifiers, commentators, or other persons, merely as “framers.” Further assume that we can identify some actual or even hypothetical intention – concrete and specific, or abstract and general – held by those identified framers.²¹⁷ We must then distinguish between the kind of original intent that we might call a substantive or first-order intent, and an original intent that qualifies as a higher-order or meta-intent.²¹⁸

Conceivably, for example, a framer of the Fourteenth Amendment may have had not only narrower and broader understandings of the Equal Protection Clause,²¹⁹ but a complex and important layering of intentions bearing upon racial discrimination loosely akin to the multiple layering of intentions a smoker might have toward smoking. Someone might genuinely intend a discriminatory interpretation of a constitutional provision, while at another level genuinely reject, be ashamed of, or intend to repudiate such a discriminatory interpretation. And one could at another level of intention also identify with, be proud of, and seek to strengthen those latter, higher-order intentions.

Perhaps even more importantly, a framer of a constitutional provision can, logically, hold any of a wide range of intentions specifically regarding whether her own intentions regarding that provision should be legally binding on future actors. Someone can strongly intend that a provision have a

²¹⁷ See Moore, *supra* note 213, at 367 (posing the question of such intention's ascertainability). For discussion of the Framers' expectation that some originally indeterminate constitutional meanings would become more determinate over time via judicial decisions, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521 (2003). For discussion of the broader problem of indeterminacy at the level of originally intended principles, see Perry, *supra* note 205, at 710–17. See also Joseph Biancalana, *Originalism and the Commerce Clause*, 71 U. CIN. L. REV. 383 (2002) (distinguishing between the “occasional” original authorial intent and the timeless original meaning of constitutional textual words, phrases, and sentences).

²¹⁸ For a discussion in a much more general context of desires, preferences, and intentions, see Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 13–17 (1971). As a general illustration, we can often detect at least three levels of preference or intention with regard to one's cigarette smoking. A person may have a first order substantive desire and intention to smoke, but a second-order, meta-desire or intention generally to give up smoking. At a third-order level, the person in question may be proud of, identify with, and want and intend to strengthen and persist in the second-order desire or intention to quit.

²¹⁹ As suggested by Professor Ronald Dworkin's distinction between a broader constitutional “concept” and a narrower, more concrete and specific constitutional “conception.” See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–36 (1977). See also Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1067 (1981) (discussing specific versus broader framer intentions); Perry, *supra* note 205, at 681–83 (focusing on the level of ratifier principle).

avored meaning for the present generation. Such a person may also seek to bind some or all future generations to the same intended meaning.²²⁰ But the same person may affirmatively intend not to bind future generations to that same meaning,²²¹ or may have no intention in the matter, whether from ambivalence, lack of foresight, conscious indifference, or failure to think of future generations at all.²²²

An originalist theorist today must consider all the possibilities. An originalist who believes the framers intended to bind us to their substantive constitutional intentions cannot, merely on that basis, conclude that we really are normatively bound for just that reason. That the framers intended to bind us does not mean that we are or should be so bootstrappingly bound.²²³ Some further argument is obviously needed. But on the other hand, it is possible that we properly should consider ourselves bound by the framers' substantive constitutional intent even if they did not wish to bind us. There may be legitimate reasons for us to feel bound by their substantive intent that the framers themselves did not fully appreciate.²²⁴

Substantively, originalists offer a family of related reasons why we should feel bound by the framers' intentions.

²²⁰ See, e.g., Johnathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U.L. REV. 253, 275 (2001) (discussing Berger's argument that "the framers . . . regarded the Constitution as a special kind of statute or contract" legitimized via ratification and then interpreted per framer intent).

²²¹ See, e.g., Paul F. Campos, *A Text Is Just a Text*, 19 HARV. J.L. & PUB. POL'Y 327, 332-33 (1996); Farber, *supra* note 213, at 1087. See also *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting) (arguing that growth in scope of interstate commerce, and of congressional regulatory power thereunder, was unforeseeable to constitutional Framers).

²²² See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985) ("Only later, during the breakdown of the Republican consensus, did the attention of constitutional interpreters gradually shift from the 'intention' of the sovereign states to the personal intentions of individual historical actors."); Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL'Y 391, 399 (1996).

²²³ See H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1532 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (purporting the Framers' intent that later interpreters be intentionalists as merely a circular justification for intentionalism).

²²⁴ Perhaps revolutionary Framers, though not our general superiors, outshone us in sheer revolutionary fervor, a fact that they, in their modesty or optimism regarding the future, did not anticipate. See Larry Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 645-46 (1985) (emphasizing time discounting as distinct from the multiplying unforeseen circumstances of the distant future); Campos, *supra* note 221, at 332-33 (discussing grounds for modesty in seeking to impose particular constitutional intentions on unenvisionable circumstances two centuries later).

One theme is the desire to constrain judicial arbitrariness and subjectivity. Achieving this goal is thought to require a touchstone reference to original intent. Justice Scalia has set forth this theme in the following terms:

[T]he main danger in judicial interpretation of the Constitution . . . is that judges will mistake their own predilections for the law. Non-originalism, which under one or another formulation invokes fundamental values as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are fundamental to our society.²²⁵

Justice Scalia does not argue that a sincerely practiced originalism precludes all judicial subjectivity.²²⁶ Judges tend to read their own values into those of the framers.²²⁷ The idea is instead that serious inquiry into framer intent is more likely to reduce judicial subjectivity than is an inquiry into a society's "fundamental values."²²⁸

Reducing judges' subjective discretion is linked to what are called the instrumentalist as well as the non-instrumentalist or legitimacy values claimed for originalism. Instrumentally, originalism is thought to promote the virtues of "stability, predictability, and clarity,"²²⁹ as well as to reduce unnecessary risk and uncertainty.²³⁰ Non-instrumentally,

²²⁵ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

²²⁶ See *id.* at 864. For some evidence that an originalist approach, as distinct from conventional political ideology, does not have much independent power to constrain or direct the originalist judge's votes, see Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002). This would seem to complicate any originalist claim that originalism limits subjectivity, where contractarian and natural law theories would in contrast supposedly give full scope to subjectivity.

²²⁷ See Scalia, *supra* note 225, at 864.

²²⁸ See *id.* See also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 252 (1990) (asserting that "[t]he principles of the actual Constitution make the judges' major moral choices for him"). According to Judge Bork, it is only once the judge sets aside or must go beyond the Constitution that "he is at once adrift on an uncertain sea of moral argument." *Id.* See also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723 (1988) ("For the Court, originalism seemingly provides a legitimate ground for decisionmaking."). Professor Monaghan joins Justice Scalia in acknowledging some legitimate and independent role for established judicial precedent. See Scalia, *supra* note 225, at 864-86; Monaghan, *supra* at 724, 772-73.

²²⁹ Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 286 (1996).

²³⁰ See Richard S. Kay, *Adherence to the Original Intentions In Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 290-91 (1988)

originalism is thought to be linked with democratic legitimacy. Thus, originalism is said to be based crucially on the idea that:

The Constitution is supreme law because it rests on the direct imprimatur of a sovereign people, expressed through the extraordinary procedures required for ratification; and its original meaning, accordingly, prevails over the lesser acts of legislators and the preferences of jurists.²³¹

If everything that constitutional originalism claims about itself is true, does constitutional originalism then amount to a genuinely self-sufficient, independent theory of constitutional decisionmaking? As it turns out, while originalism may underlie alternative theories such as textualism,²³² originalism in turn requires crucial foundational recourse to other, more basic, constitutional theories.

Originalists commonly dilute or compromise pure originalism by providing some role for precedent-based theories. But this is literally a matter of supplementation, in order to add to the appeal of the originalist theory, rather than of more deeply explaining or justifying originalism itself. The “upward” recourse to precedent takes some of the edge off an otherwise narrow devotion to original intent. Thus, almost every originalist would adulterate that theory with the doctrine of stare decisis – so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.²³³ Professor Henry Monaghan holds further that “*Brown’s* departure from the original understanding was not only defensible, but was probably the Supreme Court’s only legitimate response to the nation’s escalating moral and social turmoil.”²³⁴

(“The need for some minimum degree of stability can be seen by the fact that nearly everyone agrees that some constitutional provisions require judges to follow the evidently intended meaning.”). These instrumental virtues are, no doubt, obtainable to some degree on other constitutional approaches, including precedent-based theories in particular.

²³¹ Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 161 (1996). See also H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660 (1987) (using originalism to argue that “antimajoritarian judicial review is legitimate only when it can be shown to rest not on judicial choice but on the ratification or amendment process”); Farber, *supra* note 213, at 1085–98; Susan Burgess, *A Fine Romance: Keith Whittington’s Originalism and the Drama of U. S. Constitutional Theory*, 35 LAW & SOC’Y REV. 931, 932–33 (2001).

²³² See *supra* text accompanying notes 205–07.

²³³ Scalia, *supra* note 225, at 861, 864–65. See also Monaghan, *supra* note 228, at 724, 772–73 (discussing the status of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

²³⁴ See Monaghan, *supra* note 228, at 772.

Even here, though, the originalist may be traveling in two directions – upward for the appeal of a precedent or two, and, less obviously, downward for the foundational support of constitutional contractualist and a natural law or natural rights theory. Consider *Brown v. Board of Education*²³⁵ in particular. Can we really even begin to explain why *Brown* was the only legitimate response to moral turmoil²³⁶ by pointing to some case precedent that supports *Brown* better than does an appeal to the original intent of the framers of the Equal Protection Clause? Does the value of precedent combined with originalism fully explain why we would not overrule *Brown* today, let alone why *Brown* was rightly decided at the time?²³⁷

This is not to suggest that originalists should ignore the value of precedent and settled expectations²³⁸ for the sake of theoretical purity. Instead, the point is that the crucial departures from pure originalism cannot be fully explained as “upward” appropriations of the value of precedent. The appeal of *Brown*, initially or as an established precedent, for the originalist must crucially lie elsewhere. In part, this appeal is better understood as a matter of some sort of broad contract or natural law/natural rights approach. Doubtless the intended point of much originalism is precisely to avoid the assumed uncertainties and subjective manipulability of contract or natural law/natural rights theory.²³⁹ But even the conscious desire of originalists to avoid the latter approaches does not mean that originalists can escape logically relying on them in fact.²⁴⁰ Originalism is not a serious candidate for a self-contained, free-standing constitutional theory apart from any recourse to the latter, more “fundamental” constitutional theories. That some group of persons identified as framers clearly intended in writing for us to do something hardly begins to justify why we should now do what they intended.

²³⁵ See 347 U.S. 483 (1954).

²³⁶ See *supra* note 234 and accompanying text.

²³⁷ Of course, any “original intent plus precedent” theory must take some account of *Brown*’s effective overruling of the broad precedent of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²³⁸ See generally *supra* Part II.B and, for the influence of originalism on the theory of precedent, text accompanying notes 120–24.

²³⁹ We may take Justice Scalia’s desire to avoid “fundamental values” jurisprudence as encompassing these approaches. See *supra* text accompanying note 225.

²⁴⁰ See *infra* Part II.E–F.

It is hardly surprising, then, that originalist theory is commonly ambivalent toward contractarian and natural law/natural rights theories. The best and most obvious explanations of why intent matters to originalists will actually depend on some contractarian or natural law/natural rights theory.²⁴¹ We shall argue below that such contractarian theory itself requires in turn some sort of natural law/natural rights foundation.²⁴² Contemporary originalists must address not only the basic problem of the logical dependencies of originalist and then of contract theories, but the narrower problem of the extent to which the framers allowed for and perhaps required an enforceable natural law or natural rights theory.²⁴³ Consider, more concretely, Professor Raoul Berger's important assertion, following that of Chief Justice Marshall,²⁴⁴ that the constitutional powers of the federal government are limited,²⁴⁵ and that those limits are not to be transcended.²⁴⁶ No doubt this is a familiar claim. But the familiarity of a claim does not make it a self-justifying claim. Nor does the claim to limited as

²⁴¹ See O'Neill, *supra* note 220, at 275. While Raoul Berger among others may have tried to avoid relying, at least directly, on natural law or natural rights theories; the attempt to avoid any logical dependence on such theories cannot be guaranteed any success. See *id.* at 255–56. See also Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1767 (1997) (referring to “the social contract theory that I believe underlies both strict and moderate originalism”); Stephen Macedo, *Morality and the Constitution: Towards a Synthesis for “Earthbound” Interpreters*, 61 U. CIN. L. REV. 29, 29 (1992) (“[R]eliance on something like natural law is much more difficult to avoid than proponents of original intent, such as Raoul Berger, would have us believe.”); David A. J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1391 (1990) (reviewing ROBERT BORK, *THE TEMPTING OF AMERICA* (1990)) (referring to Bork’s unwillingness to allow any “serious role for political and moral philosophy in constitutional theory”). But see Lawrence Lessig, *The Puzzling Persistence of Bell Bottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1837 (1997) (rejecting the idea that social contract or any other theory “underlies” originalism or any constitutional practice).

²⁴² See *infra* Part II.E.

²⁴³ See, e.g., Farber, *supra* note 213, at 1092 (“[B]elief in the existence of an unwritten ‘higher law’ continued until well into the nineteenth century. Some writers argue that the Framers accepted natural law as a judicially enforceable restriction on governmental power.”); Suzanna Sherry, *Original Sin*, 84 NW. U. L. REV. 1215, 1224 (1990) (reviewing ROBERT BORK, *THE TEMPTING OF AMERICA* (1990)) (discussing the historical evidence regarding the view among framers and ratifiers “that unwritten natural law constituted a limit on legislative powers,” citing in particular Ninth Amendment historical scholarship). See also Kmiec, *supra* note 165, at 628 (“It is natural law and the natural rights derived therefrom that affirm and secure the Constitution’s original meaning.”).

²⁴⁴ See Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 BYU L. REV. 517, 517 (1997).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

opposed to unlimited federal power, in its modesty, become self-justifying.

A substantive claim by originalists for a limited federal constitutional government cannot be justified in originalist and other, non-constitutional terms. Instead, seeing the Constitution as a valid and binding contract where the relevant parties have, without injustice to others, freely and fairly agreed upon a limited federal government,²⁴⁷ allows for genuine progress in the argument. And the nature of any valid and binding such contract will, in turn, depend crucially upon notions of natural law and natural rights.

E. *Contractarian Theories*

Given the basic dependencies of textualism on originalism and, in turn, of originalism on some form of constitutional contractarianism, it is not surprising that some claim that "the fundamental theory of political legitimacy in the United States is contractarian"²⁴⁸ This section will suggest, however, that constitutional contractarianism cannot establish its moral standing and legitimacy merely by pointing to some set of historical events not constitutive of rival constitutional theories.

²⁴⁷ Admittedly, for purposes related mainly to social stability, we may care as much about whether a historical contract is now perceived as fair than about whether it actually was fair. In directing us to both these concerns, the word "legitimacy" is ambiguous. For an emphasis on legitimacy and perception, See Richard S. Kay, *"Originalist" Values and Constitutional Interpretation*, 19 HARV. J.L. & PUB. POL'Y 335, 337 (1996). To some extent, a contract theory might link public perceptions and moral realities if a judge or legislator who takes an oath to uphold the Constitution happens to interpret that oath as referring to the Constitution as it is popularly understood. But while the taking of an oath can indeed sometimes alter the moral environment, it seems possible to in good conscience take an oath to uphold the Constitution understood on one theory, even if the oath-taker knows that much of the general public disapproves of that theory. The role of the oath is probably under-emphasized in most comprehensive theories of constitutional decisionmaking. The oath is discussed, however, in Barnett, *supra* note 204, at 651; Easterbrook, *supra* note 190, at 1122.

²⁴⁸ Easterbrook, *supra* note 190, at 1121. See also Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 5 (1999) ("[T]he idea of the social contract as a source of legitimate and consensual authority has surfaced in constitutional . . . cases in this century and the last."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793). While textualism, originalism, and social contract theory can variously overlap, each can also be distinguished. Certainly social contract theory can be naturally interpreted to yield a theory (or theories) of constitutional interpretation. An obvious such approach might claim that the Constitution means X, or requires judicial outcome Y, because that is what the relevant public has agreed to by means of the social contract. Social contract theories of constitutional interpretation may include emphasis on, while still somehow transcending, the text of the Constitution, or what the original constitutional drafters had in mind.

The genuine moral bindingness of any sort of contract, constitutional or otherwise, depends upon judgments about the parties and about their freedom, knowledge, and power under the circumstances at the time of contracting. Only up to a certain point can contract theory itself determine what constitutes a valid and binding contract. The necessary further considerations are, broadly speaking, largely a matter of recourse to central elements of natural law or natural rights theories.

Indeed, the generation of the framers and their successors often thought of constitutional matters in contractualist or "social compact"²⁴⁹ terms, influenced at least indirectly by the great social contract tradition in philosophy.²⁵⁰ Social or constitutional contract theory is thus well represented explicitly within at least the early ages of American constitutional law.

Contractarian theory, however, does not construct itself automatically, independent of value choices and external

²⁴⁹ See, e.g., *Munn v. Illinois*, 94 U.S. 113, 124 (1876) ("A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'"); *id.* ("State constitutions, or other forms of the social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property."); *In re Gault*, 387 U.S. 1, 20 (1967) ("Due process . . . is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."); *Rogers v. Tennessee*, 532 U.S. 451, 467, 478 (2001) (Scalia, Stevens, Thomas, & Breyer, JJ., dissenting) ("Madison wrote that 'ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of social legislation.'") (quoting THE FEDERALIST No. 44, 282 (James Madison) (Clinton Rossiter ed., 1961)); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998) ("In his Commentaries on the Constitution, Justice Story reasoned: 'Retrospective laws are, indeed, generally unjust; and as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'") (quoting 2 JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1898)); *Kaiser Aluminum v. Bonjorna*, 494 U.S. 827, 840, 855 (1990) (Scalia, J., concurring) (quoting Justice Story from the 1851 edition). See also the view of Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.").

²⁵⁰ Beyond the basic contractarian theory classically developed by Thomas Hobbes, John Locke, Jean Jacques Rousseau and others, the worthy and easily accessible commentary includes PATRICK RILEY, WILL AND POLITICAL LEGITIMACY (1982); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962); HOBBS AND ROUSSEAU: A COLLECTION OF CRITICAL ESSAYS (Maurice Cranston & Richard S. Peters eds., 1972); THE SOCIAL CONTRACT THEORISTS (Christopher W. Morris ed., 1999); LIFE, LIBERTY, AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS (Gorden J. Schochet ed., 1971); Hanna Pitkin, *Obligation and Consent*, 59 AM. POL. SCI. REV. 990 (1965).

rational and normative standards.²⁵¹ Choices must be made in the course of developing any such theory, and the choices must be justified in rational and moral terms. As one writer formulates the main options:

Social contract views differ according to how the idea of agreement is specified: Who are the parties to the agreement? How are they situated with respect to one another (status quo, state of nature, or equality)? What are the intentions, capacities, and interests of these individuals, and what rights and powers do they have? What is the purpose of the agreement?²⁵²

Without at least implicit answers to these questions there simply is no social or constitutional contract theory. And answering these questions requires thinking at some significant moral depth, and almost inescapably, consideration of some sort of natural law or natural rights theory.

Even the most familiar non-constitutional domestic contract law must somehow answer these questions. Ordinary contract law tries to partially address some of the above questions through contract law doctrines such as duress and unconscionability.²⁵³ Unconscionability, in its procedural or substantive respects,²⁵⁴ limits what counts not only as a morally appealing contract, but even as a legally binding and enforceable contract.²⁵⁵

The idea of contractual conscionability is not reducible to a concise formula.²⁵⁶ A number of the major considerations, however, seem readily applicable to the special context of a constitutional contract. Whether a contract is unconscionable may depend, for example, on the "relative bargaining power"²⁵⁷ or the "inequality of bargaining or economic power"²⁵⁸ of the

²⁵¹ See generally JEAN HAMPTON, *THE AUTHORITY OF REASON* 204–06 (Richard Healey ed., 1998) (exploring instrumental rationality and its dependence on normative principles that influence one's choices).

²⁵² Samuel Freeman, *Reason and Agreement in Social Contract Views*, 19 PHIL. & PUB. AFF. 122, 122 (1990).

²⁵³ For background on ordinary contractual unconscionability, see JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 4-2 to 4-7, at 153–69 (5th ed. 2000); Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). For a leading case, see *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

²⁵⁴ See, e.g., *NEC Techs. v. Nelson*, 478 S.E.2d 769, 771–72 (Ga. 1996).

²⁵⁵ See *id.* at 771.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 772.

²⁵⁸ *State v. DVM Enters.*, 62 P.3d 653, 658 (Kan. 2003) (quoting *Willie v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 907 (Kan. 1976)).

parties. The courts also consider the possible "exploitation of the underprivileged, unsophisticated, uneducated, and the illiterate."²⁵⁹ The courts look finally to "the presence or absence of a meaningful choice."²⁶⁰

We may assume that exclusion from the contractual negotiating process of some groups who are nonetheless claimed to be bound by the results of the process could count as an extreme case of the considerations above. One's choice may not be meaningful, and one may be subject to exploitation, if one's participation in the contractual bargaining process is either nonexistent or limited and indirect at best. These sorts of considerations bear on the American constitutional drafting, negotiation, and ratification process.

Our point in applying the broader contractual unconscionability model is not to show whether the Constitution, as a contract, is actually morally or legally binding on anyone.²⁶¹ Nor is it to show whether any such result speaks for or against the constitutional contract model on the merits. Rather, the idea is to emphasize how contractual considerations inevitably merge into and depend crucially upon underlying moral considerations most readily thought of in broadly natural law or natural rights terms. Ideas such as lack of meaningful choice, of exploitation, and of oppression²⁶² are explained and justified not solely, if at all, with contractualist theory. These elements must be explained on broadly natural law or natural rights theory. We simply do not know how to meaningfully weigh, balance, or otherwise apply the various unconscionability factors in the absence of something like the latter, deeper sort of theory.

Consider how constitutional contract theory would inescapably rely on natural law/natural rights theory in assessing some of the critique classically associated with Charles Beard.²⁶³ Let us assume Beard to have argued, roughly, that the constitutional drafting and ratification process was exclusionary on a group basis, rather than being democratically

²⁵⁹ *Id.*

²⁶⁰ *NEC Techs. v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996) (citing *Schroeder v. Fageol Motors*, 544 P.2d 20, 23 (Wash. 1975)).

²⁶¹ For discussion of some related issues in a broader context, see generally R. GEORGE WRIGHT, *DOES THE LAW MORALLY BIND THE POOR?* (1996).

²⁶² See *NEC Techs.*, 478 S.E.2d at 772.

²⁶³ See CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

inclusionary.²⁶⁴ Securing the assumed property rights of a minority trumped the participatory interests of disenfranchised and unrepresented groups amounting to a numerical majority.²⁶⁵ Similarly, it has more recently been argued that:

The Constitution received far from overwhelming consent even from those who participated or were eligible to participate, much less from the eighty percent of the population that was ineligible. The autonomy and Pareto values that underlie consent theory simply cannot justify binding the dissenters or the disenfranchised (let alone later generations) to the will of the clique that prevailed.²⁶⁶

More concretely, “[t]he Constitution was adopted by propertied white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today. . . .”²⁶⁷

There are several possible ways of responding to such historical arguments, beyond concluding that contract theory leaves relatively few current American citizens legitimately

²⁶⁴ See generally *id.* at 324–35. For critique mainly at a level of detail beyond our interests herein, see, e.g., FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958); Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 52 (1987) (referring to the “glaring errors” of Beard’s nonetheless “important” work); Neil K. Komesar, *Paths of Influence – Beard Revisited*, 56 GEO. WASH. L. REV. 124 (1987); Shlomo Slonim, *Motives at Philadelphia, 1787: Gordon Wood’s Neo-Beardian Thesis Re-Examined*, 16 L. & HIST. REV. 527 (1998) (examining the collected relevant work of Gordon Wood).

²⁶⁵ See BEARD, *supra* note 263, at 324–35. For a contemporary normative slant, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 2 (2003).

Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slave holders and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten?

Id.

²⁶⁶ Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1498 (1985). Simon rejects as irrelevant at this level the argument that yesterday’s losers are just as likely to be tomorrow’s winners. See *id.*

²⁶⁷ *Id.* at 1499. See also Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 123 (2003) (discussing historical circumstances); Gene R. Nichol, *Toward a People’s Constitution*, 91 CAL. L. REV. 621, 634 (2003) (“The deliberations of 1787 included no meaningful debate between the haves and the have-nots.”); Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 918–20 (1986) (discussing the relative narrowness of the conception of the social contract informing the Framers’ views). But cf. McConnell, *supra* note 201, at 1132–33 (1998) (discussing a “traditionalist” response positing subsequent broad “implicit” consent to or ratification of the Constitution).

bound.²⁶⁸ But there is inescapably a limit to the ability of any contract theory to justify itself on its own internal resources. Familiar sorts of contract theory cannot by themselves suffice to choose among alternative contractual approaches to the basic contractual issues noted above.²⁶⁹ More simply put, contract theory alone cannot choose among the possible varieties of contract theory.

Thus social contract theory must appeal beyond itself for crucial definitional meaning and justification, particularly in cases where some of the bargainers have obtained resources and other bargaining advantages in ways that may not be morally justifiable. Criteria for distinguishing just from unjust advantages are therefore necessary, lest the latter unjust advantages translate themselves into the substance of any eventual contract. One obvious and general way to sort just from unjust, or justly acquired from unjustly acquired, advantages is at least partly through some rival natural law/natural rights theory.

Given the history of the contracting group, setting these morally permissible baselines certainly cannot be a matter entirely internal to social or constitutional contract theory itself. Consider, for example, that one's bargaining power could be partly a result of one's "personal" qualities. It is difficult, though, to entirely separate personal qualities from one's general stock of resources, assets, or advantages affecting one's ability to bargain. Such resources help to make us who we are. And what we have could have been obtained in morally objectionable or unobjectionable ways.

The modern contract theorist James M. Buchanan notes that "[p]hysical strength, cajolery, stealth – all these and other personal qualities might determine the relative abilities of the

²⁶⁸ See, e.g., A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 793 (1984); John Kilcullen, *Locke On Political Obligation*, 45 REV. POL. 323 (1983) (critiquing the contractarian elements in Locke's influential theory).

²⁶⁹ See *supra* text accompanying notes 251–56. One might wonder, however, whether natural law or natural right theories are in the same sense self-justifying and thus self-sufficient, or how one chooses among particular versions of such a theory. It is probably fair to say that typical well-developed natural law/natural rights theories can indeed make more progress in justifying themselves by logic internal to such theories than contract theory can justify itself in contract terms. But even if not, the crucial justification for typical natural law/natural rights theories would involve an appeal to an understanding of matters such as human nature, personhood, the world, and the universe. These broad matters do not themselves amount to or lend themselves more directly to any rival theory of normative constitutional decisionmaking.

individuals to secure and protect for themselves quantities of [some good]²⁷⁰ These personal qualities, however, are largely and in various ways social in their origin. They are not simply bestowed genetically, or received as random natural endowments. One's bargaining strength or ability to "hold out" may reflect the various legitimate and illegitimate ways in which one, or one's family, has already interacted with others.

The social or constitutional contract theorist plainly cannot afford to validate every past moral transgression, including forcible wealth transfers, by allowing the contractual bargaining to proceed on the basis of the current distribution of resources. Allowing those who are properly classified as "predators" to retain, and to bargain upon the basis of, the "fruits of predation"²⁷¹ would set up disturbing pre-contract behavioral incentives.²⁷² Some more basic theory of rights to underlie contract theory must be developed to distinguish what one has by moral right from what one has by unjustifiable predation, and to handle claims for rectification.

The contractualist may, in the end, wish to redress as much injustice as possible in transactions and the distribution of resources prior to any contractual bargaining.²⁷³ Or the contractualist may decide that this rectification process, beyond some point, becomes dubious and unduly costly. Even more importantly, the contract theorist must, with the crucial guidance of some natural law/natural rights theory, develop a sense of what sorts of activities and advantages are illegitimate and which are not. Should we count all force and fraud as illegitimate? All coercion? How is coercion to be defined?²⁷⁴ Do these considerations exhaust the realm of illegitimate practices? Again, we need a "deeper" theory to provide the

²⁷⁰ JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* 24 (1975).

²⁷¹ DAVID GAUTHIER, *MORALS BY AGREEMENT* 195 (1986).

²⁷² See *id.* at 210. For the classic disagreement between John Rawls and Robert Nozick on this point, compare JOHN RAWLS, *A THEORY OF JUSTICE* 72 (1971) (noting that undeserved assets are morally arbitrary) with ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 206-07 (1974) (rejecting Rawls' position and its implications for body part redistribution).

²⁷³ See GAUTHIER, *supra* note 271, at 201-02.

²⁷⁴ For an argument that Gauthier's understanding of "coercion" is too narrow, for reasons not entirely encompassable within standard contract theory itself, see James S. Fishkin, *Bargaining, Justice, and Justification: Towards Reconstruction, in THE NEW SOCIAL CONTRACT: ESSAYS ON GAUTHIER* 46, 47-49 (Ellen F. Paul et al. eds., 1988) (citing instances of extractive or extortive windfalls, or "structural" coercion not within the recognized scope of 'coercion' in Gauthier's model).

necessary answers. This “deeper” theory is generally the natural law/natural rights rival approach to the decision of constitutional cases.

The fundamental problem of “who counts” for constitutional or social contracting purposes – children, women, slaves, the unpropertied, future generations, or those who cannot bargain – can admittedly be addressed partially within the scope of contract theory.²⁷⁵ It is therefore necessary to deepen and criticize²⁷⁶ any contractarian rules as to “who counts,” again largely by a deeper, rival theory.²⁷⁷ Loosely put, justice and natural law/natural rights theories better explain contract theory, of whatever sort, than contract theory, including constitutional contract theory, explains justice.²⁷⁸

Put broadly, the best contemporary contract theories would try to build upon what are hoped to be relatively uncontroversial assumptions, but then develop the theory in such a way as to logically result in interesting, more controversial results. But as it turns out, the presuppositions of contract theory must inescapably be interesting and

²⁷⁵ See GAUTHIER, *supra* note 271, at 269, 270–01. A problem then remaining for constitutional contract theory is that merely bringing women, slaves, and the illiterate into the bargaining cannot validate the process if their choices would be based upon an inadequate education. Education is really more presupposed by a free and fair bargaining process, perhaps ultimately via the Fourteenth Amendment, than it is a possible outcome, of a bargaining process. More simply, a constitutional contract presupposes, rather than possibly generates, educational opportunity.

²⁷⁶ See David Braybrooke, *Social Contract Theory's Fanciest Flight*, 97 ETHICS 750, 756 (1987) (criticizing Gauthier's exclusion of people unable to contribute to the cooperative surplus). See also *id.* at 755 (certain rights postulated by Gauthier as prior to and apparently independent of any actual bargaining). Classically, the normative role of popular consent to a constitution is logically dependent upon a pre-existing natural right. See Hadley Arkes, *The “Laws of Reason” and the Surprise of Natural Law*, in NATURAL LAW AND MODERN MORAL PHILOSOPHY 146, 148 (E.F. Paul et al. eds., 2001) (discussing John Locke); Sherry, *supra* note 152, at 1146.

²⁷⁷ Jean Hampton argued in the following “deeper” terms:

[R]egardless of whether or not one can engage in beneficial cooperative interactions with another, one owes that person respectful treatment simply in virtue of the fact that he is a person. Not all value is subjective; in particular, the value which human beings have is objective, and demands one's respect, whether that human being is an infant with whom one will never have reason to cooperate, an elderly man past his prime, or an adult whose talents one finds of no particular use.

Jean Hampton, *Can We Agree On Morals?*, 18 CAN. J. PHIL. 331, 352 (1988). On the inability of Gauthier to avoid substantive moral commitments, see JEAN E. HAMPTON, *THE AUTHORITY OF REASON* 206 (Richard Healey ed., 1998).

²⁷⁸ For a broadly parallel formulation, see CHRISTOPHER NORRIS, *TRUTH MATTERS* 14 (2002). For the potentially greater capacity of contemporary, as opposed to classical, theory for transparency and criticality, see Heidi L. Feldman, *Rawls' Political Constructivism As a Judicial Heuristic: A Response to Professor Allen*, 51 FLA. L. REV. 67, 69 (1999).

controversial. As a result, the unfolding of the constitutional or other contracting process itself actually does little substantive work. The built-in and typically controversial preliminary assumptions do most of the heavy theoretical lifting, with any subsequent bargaining process being largely redundant as far as any interesting legal or moral result is concerned.²⁷⁹ Generally, contemporary contract theories cannot shift the focus of interest away from some form of underlying rival natural law/natural rights theory and onto the bargaining process itself, or any other distinctively contractual issue.

F. Particular Natural Law and Natural Rights-Oriented Theories

Thus we arrive at the theory of constitutional decisionmaking that is least practically and logically dependent for its basic meaning and justification upon its own rival constitutional theories. Although particularized natural law/natural rights theories may in some respect depend on the theories discussed above,²⁸⁰ this dependency is for some of the "raw materials" of constitutional decisionmaking, rather than for justification. There may well be a natural right to do things that activate the rival theories, such as to enter into contracts. Nor are natural law/natural rights theories independent of facts about persons, circumstances, nature, and the world.

²⁷⁹ Professor Randy Barnett has illustrated the logic of dispensing with any supposed need for a contractual consent requirement in cases where the rights-protective character of a proposal is clear. See Barnett, *supra* note 267, at 142. Professor Simon Blackburn more broadly points to redundancies in John Rawls' and T.M. Scanlon's merely formally contractualist approaches to justice, where the real work of sorting out the just and the unjust is done at stages prior to arrival at or failure to arrive at a common set of principles by the parties to the contract. See Simon Blackburn, *Am I Right?*, N.Y. TIMES, Feb. 21, 1999, at 24 (reviewing T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998)). See also Colin McGinn, *Reasons and Unreasons*, NEW REPUBLIC, May 24, 1999, at 34 (reviewing SCANLON, *supra*). But cf. Philip Stratton-Lake, *Scanlon's Contractualism and the Redundancy Objection*, 63 ANALYSIS 70 (2003) (arguing that the "standard" redundancy objection is off the mark in light of Scanlon's actual purposes). For discussion in a broader context, see Fred D'Agostino, *Contemporary Approaches to the Social Contract*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/contractarianism-contemporary> (last modified Apr. 8, 2003).

²⁸⁰ Presumably a satisfactory natural law/natural rights approach, whatever its deeper logic and more basic independence of other, rival theories, would want to consider the established constitutional text, prior decisions creating settled expectations, any promises made, and so on. Such considerations would, presumably, enter into a result reached ultimately on deeper moral or logical grounds. Natural law/natural rights theories generally need only "filling in" from rival views; rival views need more basic justification, ultimately from natural law/natural right views.

Obviously, the most plausible natural law or natural rights theories must be rooted in the world as it is.²⁸¹

The reference to "particular" natural law or natural rights theories seeks to convey and emphasize the variety of such theories. The category is intended to be inclusive, and not confined to a constitutional theory derived from the particular views of, say, Aristotle,²⁸² the Stoics,²⁸³ or Thomas Aquinas.²⁸⁴ We might refer instead simply to objective morality-based theories of constitutional decisionmaking, emphasizing the partially non-conventional and non-contractual nature of the moral assertions made by this class of theories.²⁸⁵

The role of morality-based thinking in American constitutionalism is subject to much debate. It is not much of an exaggeration to say that many persons see "[a]ll that is good and just"²⁸⁶ as within the Constitution "while all that degrades

²⁸¹ There would hardly be much point to basic rights to constitutional protection from, say, assault, hunger, or enforced ignorance if nature were very different, and we were all physically invulnerable, nutritionally self-sufficient, and inherently fully educated from birth. Presumably natural rights can change, at some level, with circumstances, reflecting our basic needs, vulnerabilities, and aspirations. See, e.g., AQUINAS, *supra* note 101, at q. 98, a. 5. See also FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 157 (Anthony Pagden & Jeremy Lawrence eds., 1991) (commenting on Aquinas, at q. 90, a. 2).

²⁸² See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* 1134b (J.A.K. Thomson, trans., rev. ed. 1976) ("There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend upon acceptance.").

²⁸³ See, e.g., MARCUS TULLIUS CICERO, *ON THE COMMONWEALTH* 215 (G. H. Sabine & S. B. Smith trans., 1929) ("There is in fact a true law – namely, right reason – which is in accordance with nature, applies to all men, and is unchangeable and eternal.").

²⁸⁴ See, e.g., AQUINAS, *supra* note 101, at q. 94.

²⁸⁵ For a range of familiar definitions of "natural law," several of which seem combinable for an especially broad understanding of the term, see Michael S. Moore, *Law As Justice*, in *NATURAL LAW AND MODERN MORAL PHILOSOPHY* 115, 115 (Ellen Frankel Paul et al. eds., 2001) (referring to definitions focusing on moral objectivity, human or non-human nature as normative, or to theistic bases for law and morality). For a contemporary example of what is in some respects a broad understanding of natural law theory, see generally DAVID BRAYBROOKE, *NATURAL LAW MODERNIZED* (2001). For useful reviews of Braybrooke, see Mark C. Murphy, *Natural Law Modernized*, 111 *MIND* 833 (2002) (book review) and Anthony Duff, *Natural Law Modernized*, 53 *PHIL. Q.* 628 (2003) (book review). Braybrooke enlists Rousseau and Hume into the core natural law project as well. BRAYBROOKE, *supra* at 12. See also MARK C. MURPHY, *NATURAL LAW AND PRACTICAL RATIONALITY* (2001) (developing a natural law theory of "human flourishing" along narrower, traditionalist lines, including Aristotelian functionalism). For a critique of Murphy, see Dudley Knowles, *Natural Law and Practical Rationality*, 112 *MIND* 555 (2003) (book review).

²⁸⁶ Gene R. Nichol, *Toward A People's Constitution*, 91 *CAL. L. REV.* 621, 621 (2003) (reviewing ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001)).

and diminishes falls outside."²⁸⁷ To this extent, many persons see the Constitution in directly moral terms. Some of the constitutional case law even into the nineteenth century reflects a directly moralized understanding of law and of adjudication.²⁸⁸

Professor Randy Barnett has made a contemporary argument²⁸⁹ that requires laws to be consistent with "the background of natural rights retained by the people."²⁹⁰ Professor Barnett argues that neither the general public nor the legislative process can optimally make such a determination with regard to particular legislation, and it therefore falls to an impartial judiciary to scrutinize legislation for natural rights violations.²⁹¹ Natural rights would thus at least limit the scope of legitimate legislative action and empower courts to give effect to those limits.

Professor Michael Perry has argued more generally that "constitutional judgment is a species of moral judgment: Constitutional judgment is the moral judgment of the

²⁸⁷ *Id.* See also Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 618 (1985) (describing the Constitution as popularly authoritative because it is widely thought to embody values of "democracy, freedom, equality, and justice").

²⁸⁸ Probably best known in this regard is the debate between Justices Chase and Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). For a more unequivocal endorsement some two decades later, see the opinion by Justice Story in *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (D. Mass. 1822):

Now in respect to the African slave trade . . . it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible, that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.

Id. As Suzanna Sherry puts the matter, "The framers . . . intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals." Sherry, *supra* note 152, at 1127.

²⁸⁹ Randy Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 97 (1995).

²⁹⁰ *Id.* Professor Hamburger adds the clarification that "[l]ate eighteenth-century Americans typically assumed that natural rights, including the freedom of speech and the press, were subject to natural law and that the laws of defamation, obscenity, and fraud reflected natural law." Philip A. Hamburger, *Natural Rights, Natural Laws and American Constitutions*, 102 YALE L.J. 907, 913 (1993). See also *Ogden v. Saunders*, 25 U.S. 213, 318-20 (1827) (Trimble, J.).

²⁹¹ Michael J. Perry, *Constitutional Judgment as Moral Judgment*, 61 U. COLO. L. REV. 803, 804 (1990).

constitutional community²⁹² Courts in particular, Perry argues, have the advantages of political insulation, relative disinterestedness, and a concrete as opposed to a merely abstract presentation of the constitutional issues.²⁹³

Joining Professor Perry, Professor Michael S. Moore begins with nuanced originalist premises that do not merely allow for, but require, conscious moral decisionmaking on the part of constitutional interpreters.²⁹⁴ The framers, on Moore's theory, had relevant intentions at various levels, including a basic desire to avoid genuine moral error and to ascertain and act on moral truth.²⁹⁵ Under Moore's theory, the framers intended not only certain concrete, substantive understandings of, for example, equal protection, but also sought and intended to be genuinely right about such important matters. Today, we may face a conflict between the framers' intention to validate, say, public flogging as not cruel or unusual, assuming they intended to bind us at all, and their presumably more basic intention to actually accord with contemporary moral reality in

²⁹² See generally *id.* See, e.g., Richard S. Kay, *Moral Knowledge and Constitutional Adjudication*, 63 TUL. L. REV. 1501, 1511–13 (1989) (contribution to symposium on MICHAEL J. PERRY'S MORALITY, POLITICS, AND LAW (1988)). For discussion of a "dropoff" in judicial constitutional enforcement of political justice outside of certain rights contexts, see Lawrence G. Sager, *Justice in Plain Clothes: Reflections On the Thinness of Constitutional Law*, 88 NW. U.L. REV. 410, 410–11 (1993). For commentary on the defensibility of the enforcement "dropoff," see Terrance Sandalow, *Social Justice and Fundamental Law: A Comment on Sager's Constitution*, 88 NW. U.L. REV. 461, 461 (1993): "Conceptions of justice have, to be sure, informed each generation's understanding of the Constitution, but that is a far cry from supposing that the Constitution commands whatever justice requires." Compare Sager, *supra* at 410–11 (arguing that "the Constitution does not even address the full range of issues that are the subject of political justice.") with Mark Tushnet, *Constitution-Talk and Justice-Talk*, 69 FORDHAM L. REV. 1999, 1999 (2001) (referring to "the justice-seeking" conception of the Constitution as one "that takes establishing justice as a goal for legislation and as a guide to the document's own interpretation," thus making the Constitution and justice allegedly coincident, "so that an inquiry into the Constitution's meaning is simultaneously, and indistinguishably, an inquiry into justice").

²⁹³ See Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 573–74, 592 (1985).

²⁹⁴ See Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087 (2001) [hereinafter Moore, *Justifying the Natural Law Theory*]. See also Michael S. Moore, *Do We Have An Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989) [hereinafter Moore, *De We Have An Unwritten Constitution?*]. For a brief summary of some of Professor Moore's logic, see John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 92–94 (2003). For a statement of Professor Perry's originalism, as distinguished from, among others, the originalism of Robert Bork, see Perry, *supra* note 205.

²⁹⁵ See Moore, *Justifying the Natural Law Theory*, *supra* note 294, at 2093–96.

their substantive judgment.²⁹⁶ Moore therefore argues that "I do not show proper fidelity to the text of the Constitution if I construe it in accordance with the framers' definitions or examples when I know those go against the actual nature of the right to which those very framers referred."²⁹⁷

Of course, others have been much less sympathetic to any natural law or natural rights approach to constitutional decisionmaking. Justice Hugo Black rejected what he referred to as a natural law jurisprudence in connection with the Due Process Clause,²⁹⁸ the Equal Protection Clause,²⁹⁹ or the Bill of Rights in general.³⁰⁰ Justice Black took his colleagues' presumed natural law theorizing as an attack on the value of a written, textual Constitution persisting over time.³⁰¹ In addition, Justice Black was troubled by what he took to be the unconstrained, arbitrary, subjective, "roaming"³⁰² quality of the natural law method, as well as its implications for federalism and the separation of powers.³⁰³

Similar doubts about natural law/natural rights reasoning in constitutional decisionmaking have been expressed by Robert Bork. Bork recognizes that moral

²⁹⁶ See *id.* at 2095–96. For a discussion of the Framers' beliefs in this regard, see Steven D. Smith, *The Constitution in the Cave*, 30 MCGEORGE L. REV. 97, 101 (1998) (nature as an ordered, as opposed to ultimately arbitrary, reality that transcends human convention and construction but is amenable to human theoretical and practical reason).

²⁹⁷ Moore, *Justifying the Natural Law Theory*, *supra* note 294, at 2093. Professor Moore elsewhere refers to tigers as a natural kind: "What I intend to refer to when I use the word 'tiger' is not . . . 'whatever class of things meets my theory (or definition) of tigers.' Rather, I intend to refer to real tigers, whatever the nature of that class turns out to be." Moore, *Do We Have An Unwritten Constitution?*, *supra* note 294, at 128. Actually, we can imagine persons wanting, for practical reasons, to continue to "misuse" terms like "water" or "tiger" once their error was pointed out. But for a believer in real truth and falsity in the realm of the moral to want to persist on a seriously mistaken path once the moral error is pointed out, would generally itself amount to a serious further moral error.

²⁹⁸ See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 676 (1966) (Black, J., dissenting). Justice Black concluded that the majority was in fact "consulting its own notions rather than following the original meaning of the Constitution." *Id.* at 677.

²⁹⁹ See *id.* at 675–76.

³⁰⁰ See *Adamson v. California*, 332 U.S. 46, 89–92 (1947) (Black, J., dissenting).

³⁰¹ See *Harper*, 383 U.S. at 677–78 (Black, J., dissenting). It should be noted that Justice Black's dissents advocating originalism or textualism over "natural law" are generally not lone dissents.

³⁰² See *id.* at 677 (Black, J., dissenting); *Adamson*, 332 U.S. at 92 (Black, J., dissenting).

³⁰³ See *Harper*, 383 U.S. at 676 (Black, J., dissenting); *Adamson*, 332 U.S. at 91–92 (Black, J., dissenting).

reasoning is inescapably part of analogizing and distinguishing constitutional cases,³⁰⁴ but he believes that such moral reasoning should be confined to deciding whether a new case falls inside or outside the scope of an established or “old” constitutional principle.³⁰⁵ Moral reasoning should not be used to create major premises or new first principles for deciding constitutional cases.³⁰⁶ This is apparently because no such principles could be agreed upon by all conscientious persons.³⁰⁷ The variety of perspectives on the right and the good indicates not that there are no right answers in moral and legal philosophy,³⁰⁸ but that there is no consensus as to what they are.³⁰⁹ Thus, we are left, Bork argues, either with majoritarian political rule,³¹⁰ or with majoritarianism filtered through and embodied in constitutional processes as originally understood.³¹¹

Justice Black’s and Robert Bork’s critiques of natural law/natural rights jurisprudence take on much different meanings if their preferred constitutional theories – textualism and originalism³¹² – are themselves inescapably and crucially dependent on natural law/natural rights theories they reject. Assume that Black’s and Bork’s Constitution was consented to by what each theorist takes, on whatever grounds, to amount to a sufficient majority. Still, the question of “who counts” inescapably arises. Is this question of “who counts” to be decided in an utterly circular, question-begging way – by a majority of those who are assumed to count? But why should a judge, elected or not, or anyone else, then feel bound by that

³⁰⁴ See BORK, *supra* note 228, at 254.

³⁰⁵ See *id.*

³⁰⁶ See *id.*

³⁰⁷ See *id.* at 254–56.

³⁰⁸ See *id.* at 256.

³⁰⁹ See BORK, *supra* note 228, at 254–56.

³¹⁰ See *id.* at 258 (“[U]nless we can rank forms of gratification, the judge must let the majority have its way.”).

³¹¹ See *id.* at 257. Bork elaborates as follows:

The judge who takes as his guide the original understanding of the principles stated in the Constitution faces none of these difficulties. His first principles are given to him by the document, and he need only reason from these to see that those principles are vindicated in the case brought before him. Nor is it an objection that those who ratified the Constitution may have lacked a shared systematic moral philosophy. They were elected legislators and under no obligation to justify moral and political choices by a philosophy to which all must consent.

Id.

³¹² *Id.*

majority? Because that is what the majority of those who are deemed to count wishes?

We might add in complications such as the existence of slave-holders and the enslaved. But the complications are inessential. If Black and Bork are to avoid the arbitrariness and subjectivity of which they accuse natural law/natural rights theory, they must somehow find a sufficient relevant moral difference between those who count and those who do not and between a resulting numerical majority and a minority. Either they cannot do so,³¹³ or they can do so only by tacit resort to some broadly natural law/natural rights constitutionalism of the kind they reject.³¹⁴

³¹³ To claim merely that a (voting) majority outvotes a (voting) minority is of no moral interest; to claim that a voting majority must prevail over a voting minority in some physical sense related to weight or force seems again either unilluminating, or an empirical claim that is open to falsification and in any event is of doubtful moral relevance. Cf. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 350 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("[I]t is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority: or else it is impossible it should act or continue one Body, one Community."). Locke would hardly pretend to describe a valid political system independent and apart from natural law and natural rights. See, e.g., JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT'* 127 (1969); JEREMY WALDRON, *GOD, LOCKE AND EQUALITY* 95 (2002) ("An awful lot of the *Second Treatise* just is a presentation of natural law; it adds up to a natural law argument . . . on issues such as property, punishment, and politics."). See also *id.* at 131 (law of nature as binding legislators).

³¹⁴ We should pause to consider the objection that Black and Bork's theories may be dependent upon natural law/natural rights theory, but that this dependence occurs only at an earlier, more fundamental stage in their overall jurisprudential theory, rather than the later stage at which some might invoke natural law/natural rights theory to decide a case. We may say that Black and Bork's textualist/originalism requires a natural law/natural rights foundation, but that Black and Bork can then avoid further reliance on natural law/natural rights theory when deciding particular cases? Even an avowed natural law/natural rights theorist (at the foundation of her constitutional theory) might recommend against trying to decide some or all individual cases by trying to sort out the specific natural law/natural rights principles at stake.

Thomas Aquinas accords substantial legal weight to custom itself. See AQUINAS, *supra* note 101, at q. 97, a. 3. Natural law/natural rights theories can in this sense be self-limiting. This does not significantly change the problem that Black, Bork, or any other textualist or originalist faces. They all must still depend crucially and deeply upon natural law/natural rights assertions, but their repudiation of such theory is general. Their claim does not seem to be merely that natural law/natural rights cannot be agreed upon or is too subjective only at the level of the judicial decision of individual cases. They do not, for example, claim that we disagree more on the natural law/natural rights merits of a police intrusion into a marital bed chamber in *Griswold v. Connecticut*, 381 U.S. 479 (1965), than on the underlying natural law/natural rights theory involved in determining more basically whether the ante-bellum Constitution was valid and binding on all affected adults. In any event, neither Black nor Bork attempts to show why the more foundational natural law theory works better than the later, more specifically adjudicatory level natural law theory.

This result does not shield natural law/natural rights constitutional theory from criticism. It certainly does not show that explicit reference to natural law or natural rights should dominate normative constitutional theory. Even an “underlying” or “foundational” natural law theorist could argue³¹⁵ that the intent of the framers was to minimize explicit reference by courts to considerations of natural law/natural rights theory.³¹⁶ And a direct response has not been offered to Black and Bork’s concerns over persisting disagreement over the relatively specific dictates of natural law and natural rights. We may think of this as the “epistemic”³¹⁷ problem of natural law/natural rights constitutional theory: What is the practical value of some constitutional answers’ better reflecting natural rights, or being objectively more just than others, if neither judges nor anyone else can reliably sort out those better and worse answers?

We seem to be left with serious practical problems of indeterminacy under any natural law/natural rights theory.

³¹⁵ See Robert P. George, *Natural Law and the Constitution Revisited*, 70 *FORDHAM L. REV.* 273, 273–74 (2001). Professor George states as follows:

[T]he framers and ratifiers of the Constitution sought to incorporate into the nation’s positive law key principles of natural justice. What a judge is authorized to give effect to, however, when interpreting the Constitution is *the positive law that the Framers created*. It is not the prerogative of judges to alter or displace the positive law of the Constitution even when they believe that their own view of what natural justice requires is superior to the view embodied in the constitutional text.

Id. (emphasis added). This formulation would rule out some forms of the judicial application of natural law, but would not, on its terms, rule out approaches indebted to Michael S. Moore’s theory. See generally the articles written by Michael S. Moore, *supra* note 294, and the accompanying text. Opting for the Framers’ presumed intent at one level, whether justifiably or not, over the Framers’ intent at another level, or in another respect, seems to fall outside Professor George’s strictures. For a further statement of Professor George’s position, see Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2282 (2001). Professor George argues as follows:

[T]he Constitution as I read the document places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts, in circumstances in which nothing in the text, its structure, logic, or original understanding dictates an answer to a dispute as to proper public policy.

Id. at 2282.

³¹⁶ See, e.g., Thomas B. McAfee, *The Constitution As Based on the Consent of the Governed-Or, Should We Have an Unwritten Constitution?*, 80 *OR. L. REV.* 1245, 1258 (2001). See also Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 *WAKE FOREST L. REV.* 747 (2001) (discussing in particular the proper limited role of the Ninth Amendment).

³¹⁷ See Moore, *Do We Have An Unwritten Constitution?*, *supra* note 294, at 136.

But the indeterminacy of natural law/natural rights theory does not release rival theories from their various dependencies. The rival normative theories of constitutional decisionmaking are still just as dependent on natural law/natural rights approaches.³¹⁸ Nor can the creative use by their adherents of those rival constitutional theories fix for their own purposes or somehow bypass the practical indeterminacies of natural law/natural rights theory.

In this connection, John Hart Ely has famously observed that: "[A]ll theories of natural law have a singular vagueness which is both an advantage and a disadvantage in the application of the theories.' The advantage . . . is that you can invoke natural law to support anything The disadvantage is that everybody understands that."³¹⁹ Additionally, there is the concern that if the Constitution is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution itself is only a makeweight: What gives force to our conclusions is simply our beliefs about what is good, just, and efficient. "Taken to its logical conclusion, this line of argument does not provide a reason for treating the Constitution as authoritative; it instructs us to ignore the Constitution whenever we disagree with it."³²⁰

³¹⁸ Natural law/natural rights theory is required as a logical and practical basic underpinning of each of the major rival constitutional theories, but this role of natural law/natural rights theory cannot guarantee that all of the rival theories, or even that any one of them, will prove ultimately viable. Even with the assistance of natural law/natural rights elements, each theory of constitutional decisionmaking may still prove inadequate, singly or in combination. On the other hand, it is implausible to argue that the indeterminacies of natural law/natural rights theories are intolerable when such a theory is being used directly to adjudicate a constitutional case, but that the taint of indeterminacy can somehow be avoided when natural law/natural rights theory is crucially incorporated into other theories of constitutional adjudication. Simply put, there is no reason to expect that the indeterminacy of natural law/natural rights theory in deciding, say, abortion cases is likely to be greater or more crucial than in justifying, say, originalist constitutional theories. Cf. Mark C. Murphy, *Natural Law Jurisprudence*, 9 *LEGAL THEORY* 241, 264 (2003) ("There is no theory of adjudication that can be both fairly called a natural law view and formulated an abstraction from the details of any natural law moral or political theory.").

³¹⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 50 (1980) (footnote omitted). See also Michael S. Moore, *Moral Reality*, 1982 *WIS. L. REV.* 1061, 1101-02.

³²⁰ McConnell, *supra* note 201, at 1129. Again, it is not clear that natural law adjudicatory theories of the general sort proposed by Michael S. Moore must be caught up in this net. See generally the articles written by Michael S. Moore, *supra* note 294 and the accompanying text. Such a theory need not assert that the Framers' intent to get morality correct, along with our own current best moral judgment, however hazy, always trumps any other sort of expression of framer intent. There may be passages in the Constitution in which trying to express true beliefs about moral reality may not

If natural law/natural rights theory is both important to constitutional interpretation and seriously indeterminate, all of the major normative theories of constitutional decisionmaking are inescapably affected by this indeterminacy.³²¹ But, the indeterminacy of natural law/natural rights theory, in general or at the level of some particular theory, may actually be no greater than the indeterminacies associated with the various rival constitutional theories. The indeterminacies particularly linked to rival constitutional theories are likely to be substantial as well. Original intent theories, for example, cannot plausibly claim to offer clear, unique, determinative answers to most interesting constitutional questions. The indeterminacy problem in the end does not affect the status of natural law/natural rights theories as less dependent upon, and essential to, their rivals.

We will not attempt here to reduce the indeterminacy of natural law/natural rights approaches by arguing for some specific favored version thereof. Instead, in the section below, we will use the very breadth of natural law/natural rights theories to gain some perspective on constitutional decisionmaking. As broad and basic natural law/natural rights theories most clearly suggest, constitutional decisionmaking is inescapably a morally charged act. We shall briefly consider below some of the implications of constitutional decisionmaking understood as inevitable moral choice. In particular, we will emphasize the importance of not losing sight of the natural law/natural rights claim that some constitutional choices are genuinely or objectively better than others, even if indeterminacies persist.³²² To the extent that natural law/natural rights theories can best account merely for why some constitutional adjudicative choices are genuinely better

have been uppermost in the Framers' minds. This may be true not only of relatively trivial matters, such as the minimum age of a President, but even of important passages such as the Article I congressional commerce clause. This is not to suggest that either clause is without moral interest.

³²¹ Again, it is possible that some or all of the rival theories of constitutional adjudication would prove unsuccessful on other grounds even if such theories took proper account of their dependency on other theories, including, in particular, on natural law/natural rights theories.

³²² Even if natural law/natural rights theories can, in a loose sense, be invoked to support "anything," in the sense of (almost) any substantive policy, they can hardly be invoked to support what are called "metaethical" positions with which they are plainly inconsistent. Thus, natural law/natural rights theories cannot be brought to the defense of a denial of the existence of objectively better and worse moral responses in at least some instances of moral choice.

than others, we will have an important reason beyond relative self-sufficiency and independence for preferring the natural law/natural rights family of normative constitutional theories.

III. FIRST THING'S FIRST IN CONSTITUTIONAL DECISIONMAKING: THE IMPORTANCE OF THE IDEAL OF MORAL OBJECTIVITY

A. *The Importance and the Inevitability of the Moral*

To decide a constitutional question is inescapably a moral activity. This is true not just for Supreme Court³²³ and other federal judges, but for executive³²⁴ and legislative³²⁵ branch actors as well as for state executive,³²⁶ legislative,³²⁷ and judicial³²⁸ officers. Voters who decide whether to amend a Constitution similarly engage in moral acts.³²⁹ In all contexts, one's constitutional choice – one's method of constitutional decisionmaking and the substantive decisional outcome itself – “stand in need of full-fledged moral justification.”³³⁰

One's constitutional choice may nevertheless depend in large measure upon role and context. Intermediate federal appellate courts, for example, are typically reluctant to anticipate the overruling of binding Supreme Court precedent.³³¹ Persons deciding constitutional questions as moral questions may take many considerations into account, including role and institutional considerations, simplifying

³²³ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³²⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Nixon*, 418 U.S. 683 (1974).

³²⁵ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³²⁶ See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

³²⁷ See *id.*

³²⁸ See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

³²⁹ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

³³⁰ See David Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 762 (1987).

³³¹ See, e.g., *United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001). The court stated:

It is not within our purview to anticipate whether the Supreme Court may one day overrule its existing precedent. “[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decision.”

Id. at 155 n.6. (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

algorithms and short cuts, and a constitutional oath.³³² Thus, constitutional decisionmakers will and perhaps should typically not take every morally relevant consideration directly into account. Non-moral considerations may be important, and some moral consideration suppressed or simplified. This does not make the constitutional decision any less of a moral decision, however. One's responsibility for autonomous moral decisionmaking remains,³³³ regardless of the range and variety of one's limitations.³³⁴

Constitutional choice is thus an inescapably moral choice, but for our purposes, we need not try to identify the predominant kind of moral thinking required. Moral thinking takes various forms, sometimes focusing on doing the right thing, sometimes on producing well-being, and sometimes on acting virtuously. Despite the fact that American constitutional decisionmaking is largely an exercise in defining and allocating rights,³³⁵ we need not rule out welfare-based³³⁶ or even virtue-based³³⁷ approaches to morality³³⁸ in deciding constitutional questions.³³⁹

³³² See *supra* text accompanying note 247. See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 105–07 (1988); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); Judith Andre, *Role Morality as a Complex Instance of Ordinary Morality*, 28 AM. PHIL. Q. 73 (1991).

³³³ See, e.g., ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 13–15 (1998).

³³⁴ See Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 802–03 (1993) (discussing the inescapably moral decisionmaking in constitutional cases faced by both positivist and non-positivist judges). Among one's moral decisions will be those bearing upon one's willingness to set aside the constitutional judgments of other, perhaps democratically elected actors. See also Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 116–18 (2002); Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, 19 Q.L.R. 463, 467 (2000) (“[E]ven though the best rules will be somewhat over and under-inclusive relative to their background moral reasons, and will thus, if followed, result in some morally regrettable acts and consequences, the moral gains from rules may still outweigh their costs.”).

³³⁵ See generally DWORKIN, *supra* note 219.

³³⁶ See generally LOUIS KAPLOW & STEVEN SHAPELL, *FAIRNESS VERSUS WELFARE* (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); J. J. C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

³³⁷ See generally Michael Slote, *Law in Virtue Ethics*, 14 LAW & PHIL. 91 (1995); L.B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003). But see R. A. Duff, *The Limits of Virtue Jurisprudence*, 34 METAPHILOSOPHY 214 (2003) (critiquing Professor Solum's article); VIRTUE ETHICS (Michael Slote & Roger Crisp eds., 1997); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999).

³³⁸ For an exceptionally useful background comparison of particular forms of deontological, consequentialist, and virtue ethics, see MARCIA W. BARON ET AL., *THREE METHODS OF ETHICS: A DEBATE* (1997). For classic discussions of the relative priority of the right and the good, see H.A. Prichard, *Does Moral Philosophy Rest on a Mistake?*,

The constitutional decisionmaker may thus face a choice of moral methodologies. But, no constitutional decisionmaker can typically step outside of morality and decide a case on non-moral but nonetheless rationally justifiable grounds, such as the dictates of sheer prudence, interest, or aesthetic value. It is impossible for the constitutional decisionmaker to transcend morality.

To assess this claim, consider morality in the different senses of the term. In the narrowest sense, morality refers merely to possible alleged offensiveness of consenting adults' conduct, with less emphasis on any possible resulting harm to those or other persons.³⁴⁰ Clearly, a constitutional decision can transcend morality in this sense. Morality in this narrow, "moralistic" sense has been challenged, on broader moral grounds, by John Stuart Mill³⁴¹ and by H. L. A. Hart in the context of victimless crimes.³⁴²

At the other extreme, morality might be defined broadly and in such a way as to merely automatically override any conflicting non-moral consideration. Other, non-moral considerations may "feed into" a moral decision, but once it is clear what morality requires or permits, the dictates of morality by their very definition are decisive and overriding, and cannot be reasonably trumped³⁴³ by any other sort of consideration.³⁴⁴ This is often stated without much clarification or exception.³⁴⁵

21 MIND 21 (1912); W.D. Ross, *The Basis of Objective Judgments in Ethics*, 37 INT'L J. ETHICS 113 (1927); W.D. ROSS, *THE RIGHT AND THE GOOD* (2d ed. 2003) (1930).

³³⁹ As an exercise, one might examine each of the various individual rights guaranteed by the Constitution to determine whether their constitutional enshrinement is more a matter of seeking to produce good welfarist consequences, or else of respecting moral imperatives, perhaps focusing on human dignity, fairness, or equality not reducible to consequentialist considerations. For further insight, see Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 792-94 (1994); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 420-22 (1993) (discussing the work of Professor Richard Fallon).

³⁴⁰ Perhaps any such narrow case could be more or less plausibly described in "broader," more comprehensive moral terms, but that would not affect the point.

³⁴¹ See JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

³⁴² See H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

³⁴³ This is not to suggest that moral rules must ever, let alone always, be exceptionless, absolute, or of infinite scope of applicability.

³⁴⁴ See, e.g., D.Z. Phillips, *Do Moral Considerations Override Others?*, 29 PHIL. Q. 247, 247 (1979) ("[O]ne distinguishing mark of moral considerations is that if a person cares for them, he cannot, at the same time, say that they should be overridden

Sometimes, though, under a more moderate view, there is merely one sense among others in which the morally right action cannot reasonably be overridden.³⁴⁶ Or, alternatively, it is held that morality can in limited cases appropriately be transcended by aesthetic, cultural, or religious obligations.³⁴⁷ The scope of the moral in such cases often remains unclear, however. For example, if one decides to abandon one's family for the aesthetic inspiration of Tahiti,³⁴⁸ or even to commit murder for the sake of obeying an assumedly superseding divine command,³⁴⁹ it is questionable whether such a person has

by considerations of any other kind.") (critiquing the view expressed in PHILIPPA FOOT, *VIRTUES AND VICES* (1978)).

³⁴⁵ See, e.g., Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 337 (1996) ("moral reasons are overriding"); Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1166 n.125 (2002) (book review) ("It is usually thought, as a conceptual matter, that moral obligations override all other obligations.") (citing William K. Frankena, *The Concept of Morality*, 63 J. PHIL. 688 (1966)). See also generally STEPHEN L. DARWALL, *IMPARTIAL REASON* (1983) (moral considerations as providing overriding reasons under appropriately specified circumstances); R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD AND POINT* 55–60 (1981) (discussing moral principles as overriding and going beyond concepts, such as, weakness of the will, moral "holidays," merely prima facie principles, etc.); KURT BAIER, *THE MORAL POINT OF VIEW* 155 (abr. ed. 1965) (1958) ("[B]eing moral is following rules designed to overrule reasons of self-interest whenever it is in the interest of everyone alike that such rules should be generally followed.").

³⁴⁶ See, e.g., ALAN GEWIRTH, *REASON AND MORALITY* 1 (1978) (moral requirements not overridable by non-moral considerations in the "core meaning" of the term); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 106–07 (1977) (discussing morality as overriding or ultimate only in its broad, all-inclusive sense, as opposed to a narrower sense, which emphasizes accommodating the interests of other persons); R.M. HARE, *FREEDOM AND REASON* 168–69 (1963) (discussing morality as overriding in "a sense of the word"); BERNARD GERT, *MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES* 203–05 (1988) (recognizing the possibility of incompatible religious mandates).

³⁴⁷ See generally JONATHAN DANCY, *MORAL REASONS* 43–47 (1993) (comparing moral with non-moral reasons); G.J. WARNOCK, *THE OBJECT OF MORALITY* 157–59 (1971) (noting that moral considerations may be outweighed by purported strictly non-moral considerations such as preservation of an historic beautiful house); PHILIPPA FOOT, *NATURAL GOODNESS* 77–78 (2001) (discussing the decisiveness of "unjust" as matched by the non-moral term "foolish"). See also Brian Leiter, *Neitzsche and the Morality Critics*, 107 ETHICS 250, 258–59, 259 n.24 (1997).

³⁴⁸ As occasionally alleged with respect to the late 19th century artist Paul Gauguin. For an approach differing from that of Michael Slote, *supra* note 337, and that of Sarah Stroud, *infra* note 350, see generally Joseph M. Kupfer, *Gauguin, Again*, 73 PAC. PHIL. Q. 63 (1992).

³⁴⁹ As discussed in the context of Abraham and Isaac. See SOREN KIERKEGAARD, *FEAR AND TREMBLING* (Howard V. Hong & Edna H. Hong trans., Princeton Univ. Press 1983) (1843) (discussing the possible "teleological" suspension of the ethical).

truly stepped outside the moral order and should not be ultimately judged in moral terms.³⁵⁰

Despite disagreements over the scope of the moral, this problem should ordinarily not loom large for constitutional decisionmakers. Typically, a judge who decides a constitutional case in the morally best or at least a morally permissible way will have reached a result not reasonably improvable by stepping outside of morality. Judges should thus not feel licensed to suspend or override the ethical for the sake of other considerations.

Suppose, for example, that someone claims a constitutional right to knock down, perhaps merely for spite, a beautiful historic house.³⁵¹ A judge agrees with the claimant, and the house is razed. Assuming that the judge has made the morally best decision, should the judge have perhaps nonetheless prohibited the demolition for the sake of non-moral aesthetic or cultural values? Why can't the public aesthetic and cultural values be reasonably brought within the scope of the moral? Or if the judge has made a mistake, why isn't it the moral mistake of over-extending or over-valuing under the circumstances the asserted constitutional right to raze? If there is any such right, why shouldn't it morally yield to a sufficiently strong competing public interest in aesthetics or culture?³⁵²

Depending on one's moral theory,³⁵³ there may well be instances in which deciding a constitutional case either way or

³⁵⁰ See generally Seana Valentine Shiffrin, *Moral Overridingness and Moral Subjectivism*, 109 ETHICS 772 (1999) (discussing moral overridingness as compatible with certain forms of moral subjectivism); Sarah Stroud, *Moral Overridingness and Moral Theory*, 79 PAC. PHIL. Q. 170 (1998) (discussing consequentialist moral theories as less easily reconciled with the overridingness of morality).

³⁵¹ As discussed in G.J. WARNOCK, *supra* note 347.

³⁵² For a recent, but admittedly only loosely comparable case, see *Nevel v. Village of Schaumburg*, 297 F.3d 673 (7th Cir. 2002) (denying permission to install vinyl siding on a house designated as an historic landmark per village ordinance did not violate owner's equal protection rights).

³⁵³ There may be, for example, moral "ties," and there may be cases in which the opposing overall moral values are sufficiently close, or so difficult to compare, that the moral costs of further examination of the two alternative courses of action exceed any likely difference. Depending upon what we see as the purpose of morality, either of two possible case outcomes may be morally permissible, if our moral theory allows for "holes" of undefined moral status in the overall "Swiss cheese" of moral decisionmaking. There may thus be zones of morally permissible constitutional outcomes encompassing two different results in the case. By loose analogy, on some moral schemes, if one is to be visited today by solicitors for four roughly equally worthy charities, all else equal, there may be a number of morally permissible ways to divide up one's overall donation.

on diverse grounds will be morally permissible. But this is far from granting a license to the decisionmaker to subordinate overall moral considerations in favor of non-moral values. Nor, typically, should the judge decide constitutional questions on the basis of sheer moral abstraction apart from any moral and non-moral social, historical, and institutional context. A judge who decides a constitutional case on moral grounds cannot entirely arbitrarily limit the various morally relevant considerations. For example, persons' reasonable expectations under the relevant circumstances normally count as somehow morally relevant. This opens the door for at least indirect consideration and use of elements of the various alternative theories of constitutional adjudication on many natural law or natural rights-based theories. Even if morality did not otherwise often require judges to consider constitutional text, framer intent, precedent, and so on, the mere fact that many persons perhaps quite reasonably expect judges to do so potentially makes those considerations somehow morally relevant. Judges are in a proper case also bound to consider among other factors not only the moral value of democratic politics, but its limits and failures as well.

Of course, a conscientious decisionmaker should strike a proper and perhaps shifting balance between inclusion of relevant considerations and justified simplification. There can be no general moral license to over-simplify the constitutional decisionmaking process, so that the judge seeks only something like fidelity to the text, and ignores everything else. Public reaction to one's decision may in various aspects be a further morally relevant consideration, but a conscientious decisionmaker cannot always be swayed by the threat of misunderstanding or adverse public reaction. These sorts of difficulties and their best resolution are inescapable elements of any serious moral decisionmaking.

B. The Importance of Moral Objectivity

Apart from all the institutional, hierarchical, informational, and broadly cultural considerations relevant to the morality of constitutional decisionmaking, judges must also consider the important possibility that some constitutional outcomes may be objectively morally better than others.

Suppose, for example, that we consider *Brown*³⁵⁴ objectively morally better than *Plessy*.³⁵⁵ What does a reference to moral objectivity add to such a statement? Does calling the case of *Brown* “objectively” morally better add much of significance to just saying that it is morally better or morally preferred?

It is useful at this point to call upon a familiar, if controversial,³⁵⁶ distinction between two “levels” of talk about morality, in order to see the import of the ideal of moral objectivity. Here is an example: Suppose Person A says that gryphons have the wings of an eagle, meaning that the thus-named purely imaginary construct is, as a matter of definition, winged like an eagle; Person B says that gryphons do not have the wings of an eagle, meaning that the same imaginary construct has, to her understanding, no wings at all; Person C says what A says, but means that he has just carefully

³⁵⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³⁵⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁵⁶ The distinction in question might not seem meaningful to some theistic ethicists, nor to some decidedly non-theistic ethicists such as Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996), and, to a perhaps slightly lesser degree, THOMAS NAGEL, *THE LAST WORD*, 125 (1997). Professor Dworkin, as his article title suggests, employs the language of moral objectivity. But while Dworkin is critical of pragmatists and other postmodernists who abandon the language of moral objectivity, it is not entirely clear how much his metaethical position really differs from theirs. Professor Dworkin, in using the term “objectivity,” may wish to claim that some acts would be morally wrong even if no one believed them to be morally wrong. But he also seems to be so broadly critical of any possible metaphysics of morals that we are left to wonder on what grounds moral truth could be so independent of universal moral belief. Just adding up various first-order or “normative” claims – e.g., that the act in question is cruel, or causes unnecessary suffering, along with some ordinary facts, does not at any point change a moral claim to an objectively true moral claim, or establish any act as objectively morally right or wrong.

Perhaps Professor Dworkin wants to distinguish mere universal moral belief, which can be mistaken, from moral beliefs that would be held under ideal conditions of full information, dispassionate neutrality, and so on. But it may be difficult to pick out some conditions as inevitably producing correct moral beliefs without having to draw upon some notion of the reality or the metaphysics of moral truth already rejected by Dworkin. See Dworkin, *supra*, at 104–05 (dismissing the idea of moral particles – “morons” – constituting moral “fields” responsible for objective moral rightness or wrongness, as part of “the fabric of the moral universe”); *id.* at 139 (describing the rejection of moral objectivity as “just false, bad philosophy”). See also Ronald Dworkin, *The Practice of Principle*, 115 HARV. L. REV. 1655 (2002) (reviewing JULES COLEMAN, *IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001)). For reactions to Dworkin’s apparent moral-objectivity-without-metaphysics position, see Brian Leiter, *Objectivity, Morality, and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66 (Brian Leiter ed., 2001); Nicos Stavropoulos, *Review of Objectivity in Law and Morals*, 65 MODERN L. REV. 634 (2002); John Tasioulas, *The Legal Relevance of Ethical Objectivity*, 47 AM. J. JURIS. 211, 225–27 (2002). See also commentaries by Simon Blackburn and Michael Otsuka, <http://www.brown.edu/Departments/Philosophy/bears/symp-dworkin.html> (last visited Oct. 12, 2004).

observed an actual gryphon *in vivo*, and has seen its eagles wings, and Person D says what B says but means that his own careful observation of actual gryphons has persuaded her that such actual gryphons are wingless.

This four person conversation about gryphons is not reducible to a single debate over a single issue, with two interlocutors on both sides fully supporting one another. It would beg the question to say that the overall debate is about the mere concept of a gryphon, or that it is about what would be discovered the next time a gryphon is encountered. Neither kind or level of question about gryphons is reducible to the other.

Loosely similar considerations arise when we use the moral language of constitutional law. When we say that *Brown* is morally or constitutionally better than *Plessy*, we may actually mean various importantly different things at different levels. Developments in ethical theory over the previous century have only multiplied the surprising range of different meanings morally endorsing *Brown* could have.

Professor John Mackie offered a useful distinction between the different meanings of morality.³⁵⁷ Mackie first grouped together statements that an action is morally right or wrong, good or bad, virtuous or vicious, along with similar claims raised to the level of a broader moral principle, such as that we morally ought to minimize suffering.³⁵⁸ These statements Mackie referred to as “first-order,”³⁵⁹ or what we might call “normative,” ethical judgments.

In contrast, Mackie also referred to “second-order,”³⁶⁰ or what we might call “metaethical,” statements. These include claims about the nature of first-order moral claims, or about “what is going on”³⁶¹ when we make such first-order moral claims. Are we claiming to have noticed something, figured out, or intuited something? Are we perhaps just expressing a preference, and inviting others to share that preference? Are we expressing some complex mental state, including the accepting of certain norms and beliefs, but in which our beliefs and decisions are ultimately emotionally or attitudinally driven? Is claiming that *Brown* is morally better than *Plessy*

³⁵⁷ See J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 9 (1977).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

like claiming that the sun is larger than the moon, or like claiming that ice cream tastes better than tree bark, or more like claiming that chocolate tastes better than vanilla?

Other accounts of what we are doing when we make constitutional moral claims, or of the metaethical status of these claims, are possible.³⁶² And it is fair to ask whether the metaethical status of constitutional moral talk really makes any practical difference. Some writers seem to believe that it does not,³⁶³ and others that it does.³⁶⁴ This Part will briefly conclude below that a constitutional decisionmaker's continuing quest for objectively morally better answers can in some cases make an important difference. To the extent that natural law or natural rights theories can best account for the

³⁶² See, e.g., ALEXANDER MILLER, AN INTRODUCTION TO CONTEMPORARY METAETHICS (2003); SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING (1998); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990); RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989); Stephen Darwall, et al., *Toward Fin de Siècle Ethics*, 101 PHIL. REV. 115 (1992). In RULING PASSIONS, *supra*, Professor Blackburn seeks to avoid both relativism and any sort of interesting moral metaphysics. As in Professor Dworkin's approach, moral objectivity, knowledge, and truth for Blackburn rise no higher than our non-metaphysical attitudes, emotions, and beliefs. These include, interestingly, that slavery would be wrong regardless of our attitudes, emotions, and beliefs about slavery. See BLACKBURN, *supra*, at 296 n.12.

Whether one can avoid moral relativism while resisting moral metaphysics is again unclear. Professor Blackburn thinks of improving one's moral attitudes in terms of avoiding inconsistency, immaturity, unimaginativeness, bias, coarseness, and natural corruption. See *id.* at 313, 320. Someone else, of course, might offer a different list – perhaps with bolder and more vitalistic Nietzschean virtues – or redefine the elements of Blackburn's list. What "bias" amounts to with respect to animals or future generations is disputable, as is the point at which coarseness begins, or the contrast between coarseness and an anti-vitalistic hyper-refinement. Are these sorts of disputes, including what constitutes "the corruption of human nature," *id.* at 320, really to be addressed with no reference to metaphysics? Yet we are somehow to avoid moral relativism. See *id.* at 314. For commentary addressing this area of Professor Blackburn's work, see, e.g., Russell Shafer-Landau, *Review of Ruling Passions*, 111 ETHICS 799, 803 (2001); Thomas Baldwin, *Expressing Feelings and Synthesizing Truths*, 42 PHIL. BOOKS 3, 8 (2001); Michael Bratman, *Review of Ruling Passions*, 109 PHIL. REV. 586, 587–88 (2000); Max Kolbel, *Review of Ruling Passions*, 111 MIND 373, 379–80 (2002) (discussing Blackburn's view on relativism).

³⁶³ See JEREMY WALDRON, LAW AND DISAGREEMENT 164–87 (1999); JEREMY WALDRON, THE IRRELEVANCE OF MORAL OBJECTIVITY, IN NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158–87 (Robert P. George ed., 1992). For related follow-up, see Jeremy Waldron, *Introduction: Disagreements on Rights and Justice*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 5 (2002–2003); Jeremy Waldron, *Moral Truth and Judicial Review*, 43 AM. J. JURIS. 75 (1998) [hereinafter Waldron, *Moral Truth*]. One might also argue the broader claim that moral theory more generally has little practical impact on the world when even the most cogent argument is matched against powerful basic interests. See Brian Leiter, *Marxism and the Continuing Irrelevance of Normative Theory*, 54 STAN. L. REV. 1129, 1151 (2002).

³⁶⁴ See, e.g., Tasioulas, *supra* note 356; Dale Smith, *The Use of Meta-Ethics in Adjudication*, 23 OX. J. LEGAL STUD. 25 (2003).

value added by the quest for morally objectively better answers, such constitutional theories again have value independent of other, rival constitutional theories. This conclusion is obscured, but not genuinely undermined, by moral indeterminacies and by the increasing sophistication of various kinds of non-objectivist metaethics.³⁶⁵

In fact, non-objectivist moral theory has become so sophisticated that it is admittedly now practically impossible to say precisely what moral objectivity is supposed to mean in a neutral, inclusive, non-controversial way that nonetheless rules out non-objectivism.³⁶⁶ As a mere rough approximation, we might seize upon Professor Robert M. Adams' formulation, in which "ethical statements are generally intended to state facts, facts that obtain independently of the preferences, feelings, and beliefs of speaker and hearer, and that . . . 'good' and 'right' are meant to signify properties of persons, actions, and other objects."³⁶⁷

The rough idea underlying moral objectivity is that it is possible for all thoughtful, reasonably disinterested moral decisionmakers to be mistaken, individually or across the board, for an indefinitely long period of time, even in their survival-conferring or otherwise useful moral beliefs. Put differently, any viable culture or group of cultures could be for various reasons morally mistaken. In fact, cultures could be morally mistaken in all they regard as morally significant. Some useful acts or practices could be morally wrong even if no actual moral actor ever thought so.³⁶⁸

³⁶⁵ See generally Blackburn, *supra* note 362.

³⁶⁶ For reference to the difficulties in this respect, see Darwall et al., *supra* note 362, at 126 n.29; Charles Larmore, *Review of Thomas Nagel, The Last Word*, 109 ETHICS 166, 167 (1998) (attempting to sort out objectivity, universal validity, universal persuasiveness, and universal justifiability).

³⁶⁷ Robert Merrihew Adams, *Précis of Finite and Infinite Goods*, 64 PHIL. & PHENOMENON RES. 439, 439–40 (2002). This formulation is useful in seeking to exclude the idea that morality can rise no higher than the consistent standards of some individual or group. It requires clarification in that the objectively morally right things to do often depend in one way or another on the feelings or beliefs of some party. Adams' formulation is far broader than is necessary to rule out Hamlet's "there is nothing either good or bad but thinking makes it so,]" including even some of the more sophisticated modern formulations. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2 (T.J.B. Spencer ed., Penguin Books 1980) (1623).

³⁶⁸ One might object to our attempt to define 'objectivity' here by pointing out that some moral objectivists have believed pervasive basic moral mistakenness to be impossible. See, e.g., AQUINAS, *supra* note 101, at q. 94, a. 6. As well, one might make an argument loosely inspired by Wittgenstein or Davidson that if a group were consistently, radically mistaken in their basic moral beliefs, we would not know whether they were actually trying to "do" what we call morality. As to the hopelessness

Does the possibility, and perhaps the occasional reality, of one moral judgment being objectively better than another moral judgment make any significant difference³⁶⁹ in the realm of constitutional decisionmaking? Some think that it does not. The main problem, as elaborated by Professor Jeremy Waldron,³⁷⁰ involves the gulf between the mere existence of an objectively better answer, and the reliable identification of that objectively better answer. Mere existence and practical detectability are two different things. The mere existence, somewhere, of an underground oil pool that is Clamptettian in size does no good if it cannot be located.

If constitutional decisionmakers generally cannot claim reliable access to objectively right constitutional answers, what practical difference does the mere existence of such unidentified right answers make? Judges who cannot reliably identify the objective better answers must be, in the end, relying on their own value judgments and reasoning processes. But this, it is said, is essentially what judges would do if there were no objective morally better constitutional answers in the first place and if we all recognized that fact. Thus, it is said, the mere existence or non-existence of objective morally better and worse constitutional answers makes no practical difference.³⁷¹

This is certainly a difficult challenge for a moral objectivist to answer, especially considering the subtlety of the various forms of non-objectivist moral discourse. A non-objectivist judge who rules favorably for a civil rights plaintiff

of defining moral objectivity, see Tasioulas, *supra* note 356, at 216, stating that "with 'ethics' there is no definitive characterization of 'objectivity' either in ethics or more generally." One broad problem is a basic mismatch between morality as a living institution, activity, or relation, and the oddly abstract and ill-suited concepts and terminology with which philosophers insist on analyzing morality. This mismatch generates anomalies, paradoxes, and insoluble problems, but not to the discredit of morality itself.

³⁶⁹ For brief suggestions that moral objectivity itself can matter in important practical ways, see, e.g., Steven D. Smith, *The Constitution in the Cave*, 30 MCGEORGE L. REV. 97, 103 (1998) ("Eliminate the assumption that ethical thought is about some objective reality, though, and the aversion to contradiction loses much of its warrant."); Robert P. George, *Holmes On Natural Law*, 48 VILL. L. REV. 1, 11 (2003). George commented:

Recognition that a 'belief' or 'love' one thought to be rationally . . . warranted . . . is, in truth, a mere subjective emotion, with no objective rational or moral warrant, is unlikely to leave that belief or love unaffected even in respect to the emotional intensity with which one holds it.

Id.

³⁷⁰ For a review of the works of Professor Waldron, see generally *supra* note 363.

³⁷¹ See Smith, *supra* note 364, at 30–40.

on an excessive force claim certainly need not solely point to her own physio-chemical reactions to the testimony, to her own attitudes or emotions, or to the collective survival value of ruling one way rather than another.³⁷² The non-objectivist judge can instead sensibly mention things like the unprovoked, unnecessary, or extreme character of the beating and its physical and emotional consequences for the civil rights plaintiff. The practical value of moral objectivism in constitutional adjudication seems thereby further diminished, given that the moral non-objectivist borrows or imitates much of what the moral objectivist might want to say.

In defense of the practical importance of moral objectivity, however, let us focus ironically on obvious judicial embarrassments to moral objectivity, such as *Dred Scott v. Sandford*³⁷³ or *Korematsu v. United States*.³⁷⁴ We can hardly claim that the underlying abuse described in even the later *Korematsu* case somehow reflects indirectly the increasing influence of emotivist³⁷⁵ revolts against the ideal of constitutional moral objectivism. The moral logic of *Dred Scott* and *Korematsu* can easily be repudiated on moral objectivist grounds. But it is also possible for adherents of any non-objectivist approach to reject these cases as well. What is it, then, that the ideal of moral objectivism can offer in such cases that non-objectivist approaches cannot entirely match with equal plausibility?

Here, one must say that the very aspiration to objective morally better answers seems in and of itself to better capture what is really at stake, or the real nature of the underlying injuries in *Dred Scott* and in *Korematsu*. The moral anti-objectivist may say that these cases and their judicial resolution are ultimately about many things, including expression of attitudes, attempts to persuade others to adopt one's attitudes, rhetorical technique and effect, culture and

³⁷² See, e.g., Blackburn, *supra* note 362, at 307–08. See also Allan Gibbard, *Normative Objectivity*, 19 NOUS 41 (1985).

³⁷³ 60 U.S. (19 How.) 393 (1856) (constitutionally repealed by the Thirteenth and Fourteenth Amendments).

³⁷⁴ 323 U.S. 214 (1944), *criticized in* Hiramabayashi v. United States, 828 F.2d 591, 593 (9th Cir. 1987).

³⁷⁵ For general development of emotivist metaethics, see generally A.J. AYER, *LANGUAGE, TRUTH, AND LOGIC* (1946 ed.); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944); Gibbard, *supra* note 362; Waldron, *Moral Truth*, *supra* note 363, at 75.

convention, genetic fitness, and individual or group-relative norms.

The moral objectivist may concede the possible relevance of any or all of these concerns, while still insisting that something more or deeper is also at stake in *Dred Scott* and *Korematsu*. More specifically, if a dominant group of persons, as in *Dred Scott*, holds a group of persons to be reducible to the status of property rather than of persons,³⁷⁶ the focus must not be on the clash between the attitudes and beliefs of that dominant group and the different attitudes and beliefs of any who oppose them. Rather, the point is that traditional slavery objectively violates personhood and the rights of persons. Moreover, the latter point can be true even if our attitudes and beliefs led us to believe otherwise, and we were all thus able to somehow convince ourselves to the contrary.³⁷⁷

We should not oversimplify the politics of such cases. At some point, even those who dismiss the ideal of moral objectivity may happen to take the side of the subordinated group, perhaps out of a sense of emotional sympathy, or perhaps of the appeal of Romantic moral posturing at minimal personal cost. In the absence of any aspiration to moral objectivity, the debate over *Korematsu* can still be subtle and complex. Such a debate must, however, hauntingly lack a certain dimension of depth. Many would want to suggest that the denial of basic social and citizenship rights, based on an analysis of racial or ethnic ancestry rather than on individualized suspicion, is contrary to the inherent and inviolable dignity and equality of the human person.³⁷⁸ This

³⁷⁶ See *Dred Scott*, 60 U.S. at 407 (For many years before the Constitution, "respectable" white public opinion held that an African-American "had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."). We may simply ask whether, when we discuss such an arrangement, we gain or lose when we set aside the claim that such arrangements are, objectively, profoundly wrong, in a sense that transcends group convention, pragmatic utility, genetic advantages, attitude or group norm expression, or any other of the varied ways of replacing the aspiration to moral objectivity. Similarly, should we view *Korematsu* as something like a mere battle of the contrasting attitudes of a dominant and a subordinate group, with everyone implicitly invited to join the fray on one side or another, but without any aspiration to any resolution objective grounds?

³⁷⁷ See *id.*

³⁷⁸ Consider the language of Justice Frank Murphy, dissenting in *Korematsu*:
[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under

allegedly naive and straightforward reaction, depending on how it is developed, may also turn out to be our most sophisticated, most illuminating, and ultimately most accurate reaction. If we abandon the idea of moral objectivity, we can at best try somehow to translate this underlying claim into some reduced, flattened and distorted, non-objectivist form that misses the essence of the dignity and of fundamental equality of persons and thus the ultimate harm in *Korematsu*.

The cost of dismissing the goal of moral objectivity, though, is not merely one of losing a crucial dimension of the underlying moral problem. The abandonment of the aspiration to moral objectivity – a metaethical claim – will in practice, over time, likely turn out not to be substantively morally neutral at the level of normative or first-order ethics.³⁷⁹ Doubtless the pretense to objective moral rightness commonly has been wrongly asserted by even the most brutally oppressive political institutions throughout history.³⁸⁰ But the development of allegedly objectively grounded principles of personal dignity, autonomy, equality, and solidarity³⁸¹ has also over the past several centuries irregularly but increasingly undermined the case for such oppression. Whether these and related values are really best served over the long term by the consistent abandonment of the aspiration to moral objectivity in legal decisionmaking is far from clear.

We must also ask whether contemporary forms of moral non-objectivism, including various forms of group-oriented

our system of law individual guilt is the sole basis for deprivation of rights . . . To give constitutional sanction to that inference in this case . . . is to adopt one of the cruelest of the rationales of our enemies to destroy the dignity of the individual.

Korematsu, 323 U.S. at 240 (Murphy, J., dissenting). There is much in Justice Murphy's discussion that can, with some plausibility, be taken in conventionalist or group-relative moral terms. There is certainly a sense of "us" versus "them," of what "we" do as opposed to what "they" do. But by the time we reach Justice Murphy's invocation of "the dignity of the individual," it seems evident that Justice Murphy is seeking to evoke the objectivity of some moral wrongs. *See id.*

³⁷⁹ For this general distinction, see MACKIE, *supra* note 357, at 9. Recall, though, that this distinction is more or less rejected by Ronald Dworkin, *supra* note 356.

³⁸⁰ Nearly every brutally, violently repressive regime from Torquemada's Inquisition, to Hitler and Stalin, to Pol Pot, at the very least, augmented any reliance on group or class identifications with some appeal to objective moral right and wrong.

³⁸¹ This requires only a sympathetic reading of documents running from the Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789) (referring to "the natural, unalienable, and sacred rights of man") all the way up to the Nuremberg Code (1947) and the European Parliament Resolution on Human Cloning (2000).

relativism and moral skepticism, really have much long-term overall progressive value. Again, any sort of mere faddism or moral posturing, particularly if the actual personal costs are low, can for a time sustain progressive movements. Eventually, though, the basic elements of political and constitutional progressivism will generally require rather substantial and sustained sacrifices of wealth and power by the relatively well off.

If constitutional progressivism is thus to proceed beyond largely symbolic or limited changes, and to seriously confront the most basic economic and social obstacles faced by the most structurally disadvantaged, a substantial long-term redistribution of society's resources and opportunities will have to be undertaken. This sort of substantial redistribution is unlikely to leave everyone, including the privileged, at least as well off as before. These sorts of broad-scale redistributive undertakings may well require the abandonment of familiar privilege and substantial tangible and intangible resource advantages.³⁸² The beneficiaries of such redistributions may well be those with whom the transferors share relatively little genetically or culturally, and who are ultimately unlikely or unable to cooperate voluntarily in such a crucial redistributive undertaking.

Constitutional progressivism is thus tied up with substantial and sustained individual and group sacrifices, with such sacrifice being largely by well-off and economically powerful persons and groups who are identifiable in advance. A constitutional progressive must wonder, then, whether any form of non-objectivism in constitutional morality is likely, with no disguised recourse to moral objectivity, to prove sufficiently motivating for a sufficient number of persons over a sufficient period of time.

Constitutional progressivism with no aspiration to objective moral rightness would be asking persons and groups accustomed to power and advantage to do much more than engage in minimalism, symbolism, tokenism, and moral preening. Substantial and likely uncompensated sacrifice by the relevant groups and individuals, and by their own

³⁸² Thus, progressive accounts of basic constitutional and other institutional change often build in, as in the case of John Rawls' famed "veil of ignorance," some mechanism for bypassing the likely need for substantial sacrifice on the part of relatively well-off persons and groups. See JOHN RAWLS, *A THEORY OF JUSTICE* 11, 118-23 (rev. ed. 1999) (1971).

immediate descendents, would be required. By our assumption, the case for that sacrifice could not, even by disguise, rhetoric, or indirection, depend in the slightest on the idea that such sacrifice is objectively just, fair, or right. No recourse to the idea of such a sacrifice's being objectively morally appropriate, let alone morally required, could be allowed.

No doubt constitutional progressives could tell "sad" and "sentimental stories"³⁸³ intended to inspire elite compliance with the broad and on-going overall sacrificial enterprise. Persons less disposed toward such sacrifice could, however, tell counter-stories of supposed personal desert, individual heroism, redistributive waste and inefficiency, intrusion, sense of violation, disruption and loss, and so on. And the "sad" and "sentimental stories"³⁸⁴ told in favor of re-distribution would on their own logic again be barred from drawing in any way upon the idea of any objective right or wrong.³⁸⁵

Doubtless, the sword of moral objectivism in the constitutional realm and elsewhere has always been regrettably double-edged. But anyone with sympathy for progressive constitutionalism should recognize moral objectivism as practically indispensable to the success of such a project.³⁸⁶ We should therefore think not only in moral terms in

³⁸³ See 3 RICHARD RORTY, *TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS* 172 (1998).

³⁸⁴ See *id.*

³⁸⁵ See generally G.A. COHEN, *IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH?* 117-63 (2000).

³⁸⁶ Professor Dworkin is one of the great contemporary champions of a form of substantive egalitarianism. See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000). He is, however, not particularly aggressive in translating this sort of moral preference into equal protection clause jurisprudence. For an argument that Dworkin winds up excessively bound to the constitutional text, whatever the moral status of that text, and should actually give freer reign to more "abstract" moral philosophy independent of that text, see Edward B. Foley, *Interpretation and Philosophy: Dworkin's Constitution*, 14 *CONST. COMMENT.* 151 (1997). Professor Foley, in turn, would emphasize moral philosophy on its own terms, not because the Constitution itself is thought to require such an emphasis, but because Foley emphasizes a form of consent theory, which we have seen to be crucially dependent upon rival, more basic theories. See *id.* at 171-72; see also *supra* Part II.D.

Professor Dworkin's constitutional theory has also been characterized as a semantic or word-meaning originalism, as opposed to an originalism that is bound by the Framers' own subjective intent, expectations, and inferences. See Jeffrey Goldsworthy, *Dworkin As An Originalist*, 17 *CONST. COMMENT.* 49, 49-50 (2000). If we focus on the moral elements of Professor Dworkin's approach, we must first decide whether to characterize Dworkin's moral thinking as really aspiring to objectivity or not. See generally Dworkin, *supra* note 356.

We would then want to explore why Dworkin bifurcates his constitutional theory first into a concern for "fit" and second into a concern for "justification" or moral principle. We should also like to see why certain elements are included within or

deciding constitutional cases, we should aspire to objectively morally better rather than worse answers in any such cases.

This emphasis on moral rightness, of an objective sort, of course corresponds most directly to the character of the most fundamental, independent, and self-sufficient normative constitutional theories, those focusing on natural law and natural rights. The broad family of natural law and natural rights constitutional theories is thus not only the most self-sufficient of all the rival theories, but best accounts for and most naturally accommodates our entirely reasonable and worthwhile aspiration to objectively morally better answers to crucial constitutional questions.

excluded from considerations of "fit," and why the relation between "fit" and "justification" is one of strict hierarchy, given some minimal degree of fit, and not one of balancing degrees of fit and justification or even of ignoring 'fit' altogether. Finally, we would want to know why we are to be making the Constitution the best it can be, as opposed to, say, doing the morally right thing, maximizing virtue, or producing the best possible consequences.

In any event, we would recognize that Dworkin even at his most explicitly moralistic offers us only one possible model among others for the morality of constitutional decisionmaking. For a discussion of the more and less moral aspects of Dworkin's constitutional decisionmaking theory, see Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment On Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997).